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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Region 10
1200 Sixth Avenue
Seattle, Washington 98101

IN THE MATTER OF:

Environmental Protection Agency

Complainant,

v.

Arrcom Incorporated,
Drexler Enterprises Incorporated,
George W. Drexler (Operator),
Thomas Drexler (Operator),
W. A. Pickett (Operator),
Warren Bingham (Owner),

Respondents.

RCRA Docket X-83-04-02-3008

COMPLAINT AND
COMPLIANCE ORDER

COMPLAINT

This is a civil administrative action initiated pursuant to Section 3008(a) of the Resource Conservation and Recovery Act [42 U.S.C. 6928(a)], hereinafter referred to as "the Act." The Complainant is Region 10 of the United States Environmental Protection Agency (EPA). Based on a compliance inspection conducted on July 20, 1982, by EPA and the Panhandle Health District I (Idaho), Complainant has reason to believe that the above-named Respondents have violated Section 3005 of the Act (42 U.S.C. 6925) as follows:

FINDINGS OF FACT

1
2 1. Respondents have operated a facility (ID0000800961) for the
3 treatment, storage, and/or disposal of hazardous waste since January 1,
4 1980, located at 5 miles East of the Stateline on Highway 53, Rathdrum,
5 Idaho (mailing address: Rural Route 3, Box 258-A6, Rathdrum, Idaho
6 83858). Furthermore, Respondents are transporters of hazardous waste.
7 Hazardous waste manifests from the United Paint Manufacturing Company,
8 Washington (nine manifests from November 19, 1980 to December 3, 1981)
9 and the Anaconda Aluminum Company, Montana (one manifest dated February
10 26, 1981) document these activities.

11 2. Respondents submitted a Notification of Hazardous Waste Activity
12 (EPA Form 8700-12) which was received by EPA on August 20, 1980. This
13 notification satisfied 3010(a) of the Act and 40 CFR 122.21(c)
14 [recodified on April 1, 1983 as 40 CFR 270.1(b)]. This notification
15 indicated that Respondents were generators and also treaters, storers,
16 and/or disposers of hazardous waste.

17 3. 40 CFR Part 262 establishes standards for all hazardous waste
18 generators. Respondents are generators of hazardous waste as evidenced
19 by the Notification of Hazardous Waste Activity.

20 4. Respondents submitted a Part A permit application (EPA Form
21 3510-1) which was received by EPA on November 19, 1980, as required by 40
22 CFR 122.22 [recodified on April 1, 1983 as 40 CFR 270.10]. This
23 application stated that the Respondents were storers and treaters of
24 hazardous waste.

25 5. 40 CFR Part 265 establishes standards for all hazardous waste
26 treatment, storage, and disposal facilities. These standards apply until
27 final administrative disposition of permit applications submitted by

1 owners and operators of facilities has been made. No such disposition
2 has been made with respect to Respondents' facility. Thus, the standards
3 of 40 CFR Part 265 apply thereto.

4 6. Respondents submitted a Part A permit application without having
5 a proper signatory for the permit as required by 40 CFR 122.4(b)
6 [recodified on April 1, 1983 as 40 CFR 270.10(b)]. W. A. Pickett, an
7 employee for Respondent George W. Drexler (operator), signed the Owner
8 Certification of the application. Respondent Warren Bingham (owner)
9 stated to EPA on July 9, 1982, that he had not authorized W. A. Pickett
10 to sign the Part A permit application as the owner of the facility.

11 7. Complainant, in a letter dated February 9, 1982, requested that
12 Respondent submit a corrected Part A permit application or submit a
13 closure plan. Respondents have subsequently stopped operation but have
14 neither resubmitted the Part A permit application nor submitted a closure
15 plan. As evidenced in paragraph 8, below, hazardous waste remains
16 onsite; therefore, the facility has not been properly closed as required
17 by 40 CFR 265.111.

18 8. Respondents spilled and/or disposed hazardous waste or hazardous
19 waste constituents into the soil surrounding the Shaker Building of the
20 facility. Such release of hazardous waste or hazardous waste
21 constituents into the environment constitutes disposal. The facility has
22 not qualified for "interim status" for disposal and therefore is in
23 violation of Section 3005 of the Act. Samples of contaminated soil and
24 of spilled material taken during an inspection conducted by EPA employees
25 on July 20, 1982, and subsequently analyzed revealed the following
26 hazardous wastes constituents: 1,1,1-trichloroethane; ethylbenzene;
27 methylene chloride; and toluene. Spent ethylbenzene and toluene were

1 reported in the Respondents' Part A permit application (EPA Hazardous
2 Waste Codes F003 and F005, respectively).

3 9. Respondents further failed to comply with the regulatory
4 requirements applicable to a hazardous waste management facility in that
5 they failed:

6 (a) to prevent the unknowing entry and to minimize the possibility
7 for the unauthorized entry of persons or livestock as required
8 by 40 CFR 265.14. Fencing at the site did not completely
9 surround the active portion of the facility,

10 (b) to maintain and operate the facility to minimize the possibility
11 of any release of hazardous waste as required by 40 CFR 265.31,

12 (c) to have an external communication device capable of summoning
13 emergency assistance and to maintain fire control equipment as
14 required by 40 CFR 265.32, and

15 (d) to submit financial assurance and liability documents as
16 required by 40 CFR 265, Subpart H.

17 10. Complainant's review of Respondents' records revealed that the
18 Respondents failed:

19 (a) to develop a written waste analysis plan as required by 40 CFR
20 265.13(b),

21 (b) to develop a written inspection schedule for inspections as
22 required by 40 CFR 265.15(b)(1),

23 (c) to develop a written training schedule and maintain records as
24 required by 40 CFR 265.16,

25 (d) to attempt to make contingency arrangements with local
26 authorities as required by 40 CFR 265.37,

- 1 (e) to develop contingency plan and emergency procedures as
2 required by 40 CFR 265.51(a),
3 (f) to maintain manifests and operating records required by 40 CFR
4 265.71 and 40 CFR 265.73, respectively, and
5 (g) to develop a closure plan as required by 40 CFR 265, Subpart G.

6 PROPOSED CIVIL PENALTY

7 In view of the above-cited violations, Complainant proposes to assess
8 a penalty of SEVENTY-FIVE THOUSAND NINE HUNDRED AND TWENTY-FIVE DOLLARS
9 (\$75,925), computed in accordance with EPA Guidelines for penalties
10 assessed under the Act, as follows:

11	<u>Violation</u>	<u>Proposed Penalty</u>
12	*40 CFR 122.4(b)	\$ 22,500
13	RCRA Section 3005	\$ 22,500
14	40 CFR 265.13(b)	\$ 4,500
15	40 CFR 265.14	\$ 2,550
16	40 CFR 265.15(b)(1)	\$ 1,975
17	40 CFR 265.16	\$ 800
18	40 CFR 265.31	\$ 2,500
19	40 CFR 265.32	\$ 9,900
20	40 CFR 265.37	\$ 800
21	40 CFR 265.51(a)	\$ 1,975
22	40 CFR 265.71(a)(5)	\$ 1,975
23	40 CFR 265.73	\$ 1,975
24	40 CFR 265.112	<u>\$ 1,975</u>
25	Total	\$ 75,925

26
27 *Recodified on April 1, 1983 as 40 CFR 270.10(b)

COMPLIANCE ORDER

Based on the foregoing and pursuant to Section 3008 of the Act, it is hereby ordered that the Respondents take the following actions within the time periods specified:

1. Respondents shall immediately upon receipt of this Order, develop a written plan to cleanup the hazardous waste and hazardous waste constituents that have spilled or were otherwise released onto the ground or into ground-water, and/or that have migrated into the ground or into ground-water. This plan shall address the cleanup and disposition of all contaminated soil, water and ground-water such that all remaining soil, water, and ground-water are at background level. This plan shall also address the sampling and analysis necessary to confirm adequate cleanup. This plan shall be submitted to Mr. George Hofer at the U.S. Environmental Protection Agency, 1200 Sixth Avenue, Seattle, WA 98101-3188 within 20 days of receipt of this Order. This plan, after modification and approval by EPA, shall be implemented within five (5) days of EPA's approval and completed as expeditiously as possible but in no event later than thirty (30) days after EPA approval.

2. Respondents shall within one hundred and eighty (180) days of receipt of this Order submit a Part B permit application in accordance with 40 CFR 122.22(a)(4) [recodified on April 1, 1983 as 270.10(e)(4)]. This Part B permit application shall address the relevant requirements listed in 40 CFR 122.25 [recodified on April 1, 1983 as 40 CFR 270.14 thru 270.21]. This order constitutes a formal request for a Part B permit application pursuant to 40 CFR 122.22(a)(4) [recodified on April 1, 1983 as 270.10(e)(4)]. This Part B permit application shall be submitted to Mr. George Hofer at the address listed in paragraph 1.

1 Failure to submit a complete application may result in further
2 enforcement action and will result in the initiation of permit denial,
3 which will terminate interim status for this facility in accordance to 40
4 CFR 122.22(a)(5) [recodified on April 1, 1983 as 40 CFR 270.10(e)(5)].

5 3. Respondents shall comply with either paragraphs 4 and 5 or
6 paragraphs 6 thru 8 (inclusive). Respondents shall, within fifteen (15)
7 days of receipt of this Order, state in a letter to Mr. George Hofer at
8 the above address which option has been chosen.

9 4. If Respondents elect to permanently cease operation as a hazardous
10 waste facility, Respondents shall submit a written statement to Mr.
11 George Hofer at the above address which contains the following within
12 fifteen (15) days of receipt of this Order:

13 (a) Request for EPA to deny Respondents' Part B permit application.

14 (b) Waiver of the one hundred and eighty (180) day Part B
15 preparation period allowed for in 40 CFR 122.22 [recodified on
16 April 1, 1983 as 40 CFR 270.10].

17 (c) Declaration that Respondents will cease operation immediately
18 and will close the facility within one hundred and eighty (180)
19 days.

20 5. Respondents shall submit an appropriate closure plan in
21 accordance with 40 CFR 265, Subpart G within thirty (30) days of receipt
22 of this Order. Closure of this facility shall commence upon submission
23 and Complainant's approval of the plan and shall be accomplished as
24 expeditiously as possible but in no event later than one hundred and
25 eighty (180) days from the receipt of this Order. The Closure Plan shall
26 be submitted to Mr. George Hofer at the above address.

1 6. Respondents shall immediately upon receipt of this Order
2 initiate the following activities:

- 3 (a) Inspect the facility for discharge of hazardous waste and for
4 deterioration of containers, tanks, and equipment as required by
5 40 CFR 265.15(a) and (c), 40 CFR 265.174, and 40 CFR 265.194.
6 (b) Maintain personnel training records as required by 40 CFR 265.16.
7 (c) Maintain manifest copies as required by 40 CFR 265.71.
8 (d) Maintain operating records as required by 40 CFR 265.73.

9 7. Respondents shall immediately on the receipt of this Order
10 institute the following activities and complete these activities
11 as expeditiously as practicable but in no event later than
12 thirty (30) days after the receipt of this Order:

- 13 (a) Remedy any deterioration of tanks and equipment revealed through
14 inspection pursuant to 40 CFR 265.15(c).
15 (b) Install required communication and emergency equipment as
16 required by 40 CFR 265.32.
17 (c) Make contingency arrangements with local authorities as required
18 by 40 CFR 265.37.
19 (d) Install needed security system as required by 40 CFR 265.14.

20 8. Respondents shall submit to George Hofer at the above address,
21 within thirty (30) days of the receipt of this Order, the
22 following:

- 23 (a) A Part A application containing the proper signatures as
24 required by 40 CFR 122.4(b) [recodified on April 1, 1983 as 40
25 CFR 270.10(b)].
26 (b) Inspection Plan to satisfy 40 CFR 265.15(b)(1).
27

- (c) Training Plan to satisfy 40 CFR 265.16.
- (d) Contingency Plan to satisfy 40 CFR 265, Subpart D.
- (e) Closure Plan to satisfy 40 CFR 265, Subpart G.
- (f) Financial assurance and liability documents to satisfy 40 CFR 265, Subpart H.

OPPORTUNITY TO REQUEST A HEARING

A copy of the "Consolidated Rules of Practice" governing these penalty proceedings is attached. Under those rules Respondents have the right to request a hearing:

- (a) to contest any material fact set forth in the Complaint, or
- (b) to contest the appropriateness of the proposed penalty, or
- (c) to contend that Respondents are entitled to judgment as a matter of law.

To avoid being found in default, having the proposed civil penalty assessed, and the Compliance Order becoming final without further proceedings, Respondents must file a written response to the Complainant. Respondents' written response may include a request for a hearing, if desired. The response (if any) must be addressed to the Region 10 Hearing Clerk, Office of Regional Counsel, U.S. Environmental Protection Agency, M/S 613, 1200 Sixth Avenue, Seattle, Washington 98101-3188 and sent within thirty (30) days of Respondents' receipt of this Complaint and Compliance Order. Respondents' response should clearly and directly admit, deny, or explain each of the factual allegations contained in the Complaint about which Respondents have any knowledge. The response should contain: (1) a definite statement of the

1 facts which constitute the grounds of defense, and (2) a concise
2 statement of the facts Respondents intend to place at issue in the
3 hearing if requested.

4 If Respondents fail to file a written answer within thirty (30) days
5 of receipt of this Complaint and Compliance Order, such failure
6 constitutes an admission of all the facts alleged in the Complaint and a
7 waiver of Respondents' right to a hearing. A final order upon default
8 will thereafter be issued by the Regional Administrator and filed with
9 the Region 10 Hearing Clerk.

10 Any hearing requested by Respondents will likely be held at the
11 Region 10 office of EPA in Seattle. Hearings held will be conducted in
12 accordance with the attached Consolidated Rules of Practice (40 CFR Part
13 22 (45 FR 24363)).

14
15 INFORMAL SETTLEMENT CONFERENCE

16 Whether or not Respondents requests a hearing, EPA encourages
17 settlement of this proceeding consistent with the provisions of the Act.
18 At an informal conference with representatives of the Complainant,
19 Respondents may comment on the charges and provide whatever additional
20 information Respondents believe is relevant to the disposition of this
21 matter, including any actions Respondents have taken to correct the
22 violations and any other special circumstances Respondents care to raise.

23 Respondents' request for an informal conference and other questions
24 that Respondents may have regarding this Complaint should be directed, in
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26
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1 writing, to Mr. Kenneth D. Feigner, U.S. Environmental Protection Agency,
2 Region 10, M/S 533, 1200 Sixth Avenue, Seattle, Washington 98101-3188, or
3 by telephone to Mr. Feigner at (206) 442-2782.

4 Please note that a request for an informal settlement conference does
5 not extend the thirty (30) day period during which a written answer and
6 request for hearing must be submitted. The informal settlement
7 conference procedure may be pursued simultaneously with the adjudicatory
8 hearing procedure. Any settlement which may be reached as a result of
9 such conference will be embodied in a written Agreed Final Compliance
10 Order to be issued by the Regional Administrator of EPA, Region 10, and
11 signed by Respondents. Respondents' signing of such Agreed Final
12 Compliance Order would constitute a waiver of Respondents' right to
13 request a hearing on any matter stipulated therein.

14
15 NOTICE OF LIABILITY FOR ADDITIONAL CIVIL PENALTIES

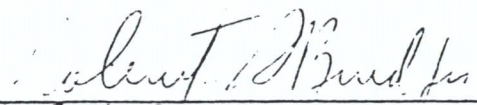
16 Pursuant to the terms of Section 3008(a)(3) of the Act, a violator
17 failing to take corrective action within the time specified in a Final
18 Compliance Order is liable for a civil penalty of up to TWENTY-FIVE
19 THOUSAND DOLLARS (\$25,000) for each day of continued noncompliance.

20
21 RESOLUTION OF THIS PROCEEDING WITHOUT HEARING OR CONFERENCE

22 Instead of filing an answer requesting a hearing or requesting an
23 informal settlement conference, Respondents may choose to comply with the
24 terms of the Compliance Order, and to pay the proposed penalty. In that
25 case, payment should be made by sending to the Regional Hearing Clerk,
26 U.S. Environmental Protection Agency, Region 10, M/S 613, 1200 Sixth
27 Avenue, Seattle, Washington, 98101-3188, a cashier's check or certified
28 COMPLAINT AND COMPLIANCE ORDER--Page 11 of 12

1 check payable to "Treasurer, United States of America" in the amount
2 specified in the "Proposed Civil Penalty" section of this Complaint and
3 Compliance Order.

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5 DATED this APR 27 1983 day of _____ 1983.

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8 L. Edwin Coate
9 Acting Regional Administrator
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BEFORE THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
EPA REGION 10, 1200 SIXTH AVENUE
SEATTLE, WASHINGTON 98101

In The Matter of:

Arrcom, Incorporated,
Drexler Enterprises, Inc.,
et. alia,

Respondents.

PERMIT NO. ID 0008000961

NO. X83-04-01-3008 &
83-04-02-3008

AGREED ORDER FOR PAYMENT OF
CIVIL PENALTIES
RE RESPONDENT WARREN BINGHAM

1. This proceeding for the assessment of civil penalties was commenced by the filing and issuance of a Complaint herein, X83-04-02-3008, against Respondent Warren Bingham and others pursuant to Section 3008 of the Resource Conservation and Recovery Act of 1976, as amended, 42 U.S.C. § 6928.

2. The signatories hereto, parties herein, settle and resolve the claims set forth in the Complaint by the entry of this Order, and the said parties stipulate and agree (by their signatures below) this Order may be entered without further notice or proceedings herein.

FINDINGS OF FACT

1. A facility consisting of several storage tanks, oil reprocessing equipment, and two buildings exists on a site located near Rathdrum, Idaho, five (5) miles east of the Washington-Idaho stateline on Idaho state Highway 53 (fully described in Attachment 3) (hereinafter "the Rathdrum facility").

2. The Rathdrum facility was operated from at least January 1, 1980 for the storage, treatment and disposal of used oil, spent solvents, and chemical substances such as toluene and ethylbenzene.

3. The Rathdrum facility was operated by respondents Arrcom, Incorporated and Drexler Enterprises, Incorporated, and George W. Drexler, William Pickett, and Thomas Drexler, between at least January 1, 1980, and January 1, 1982. On or around January 3, 1982, the Rathdrum ceased operation as an active, processing facility.

4. Respondent Warren Bingham purchased the Rathdrum facility on January 1, 1980, thereafter owned and possessed the facility, and thereafter leased the facility to respondent Arrcom, Inc. Respondent Bingham did not operate in any way the active facility between January 1, 1980 and January 1, 1982. Arrcom's lease for the facility was terminated on or around January 3, 1982.

5. A Part A RCRA permit application for interim status was submitted for the Rathdrum facility on November 19, 1980, and this application listed the owner of the Rathdrum facility as Arrcom, Inc.

1
2 6. Interim status for the treatment and storage of
3 hazardous wastes with ignitable characteristics at the Rathdrum
4 facility was recognized by the Environmental Protection Agency
5 (EPA) on August 11, 1981. No interim status was recognized for the
6 handling of any other hazardous wastes, or for the disposal of
7 ignitable characteristic hazardous waste.

8 7. During the operation of the Rathdrum facility, used
9 oil with ignitable characteristics and other chemical substances
10 such as toluene and ethylbenzene were released into the environment
11 at the facility through the dumping and/or spilling of used oil,
12 spent solvents, and other chemical substances such as ethylbenzene
13 onto the ground.

14
15 8. During the operation of the Rathdrum facility, no
16 security fence was placed around the facility, nor were any other
17 devices implemented to prevent the unknowing entry of persons or
18 livestock on the facility.

19 9. During the operation of the Rathdrum facility, no
20 efforts were made to minimize the possibility of any release of
21 hazardous wastes.

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23 10. During the operation of the Rathdrum facility, no
24 external communication device capable of summoning emergency assist-
25 ance was kept at the facility.

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27 11. During the operation of the Rathdrum facility, no

1 written waste analysis plan was developed or utilized at the facility.

2 12. During the operation of the Rathdrum facility, no
3 written inspection schedule for equipment and storage units, or
4 hazardous wastes was developed or maintained at the facility.
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6 13. During the operation of the Rathdrum facility, no
7 attempts to make contingency arrangements with local authorities
8 were made.

9 14. During the operation of the Rathdrum facility, no
10 manifest records or operating records were maintained at the facility.
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12 15. During the operation of the Rathdrum facility, no
13 closure plan was developed or submitted for the facility.
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15 16. After January 1, 1982, no closure plan was submitted
16 to EPA, or implemented for the Rathdrum facility, nor was the
17 facility actively operated pursuant to applicable RCRA regulations.

18 17. In September, 1983, EPA undertook a cleanup effort
19 at the site, which removed most used oil, spent solvents, and other
20 chemical substances from the Rathdrum facility.
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22 18. At all times relevant herein, Respondent Bingham has
23 cooperated with EPA in granting access to the Rathdrum site.
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25 CONCLUSIONS OF LAW

26 1. From at least January 1, 1980 to September 1984,
27 the Rathdrum facility was an existing hazardous waste management
28
AGREED PENALTY ORDER - Page 4 of 10

1
2 facility for the storage, treatment and disposal of hazardous
3 waste, pursuant to 40 CFR § 260.10.

4 2. The Part A permit application submitted for the
5 Rathdrum facility was submitted without a proper signatory for the
6 owner, in violation of 40 CFR § 270.10(b), formerly 40 CFR § 122.4(b).

7 3. The Rathdrum facility was used for the disposal of
8 hazardous wastes without a valid permit between January 1, 1980 and
9 September 1983, in violation of 40 CFR 270.1(b) and section 3005
10 of RCRA, 42 U.S.C. § 6925.

11 4. No efforts were made at the Rathdrum facility to
12 minimize the possibility of unauthorized entry during the operation
13 of the facility, in violation of 40 CFR § 265.14.

14 5. Inadequate efforts to minimize the possibility of
15 any release of hazardous waste at the facility were made at the
16 Rathdrum facility, in violation of 40 CFR § 265.31.

17 6. No external communication device capable of summoning
18 emergency assistance was provided at the facility, in violation of
19 40 CFR § 265.32.

20 7. No written waste analysis plan was developed or
21 utilized at the facility or elsewhere, in violation of 40 CFR
22 § 265.13(b).

23 8. No written inspection schedule was maintained at the
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facility or elsewhere, in violation of 40 CFR § 265.13(b)(1).

9. No written training schedule or records of training were developed or maintained at or for the Rathdrum facility or elsewhere, in violation of 40 CFR § 265.16.

10. No attempts were made to make emergency contingency arrangements with local authorities near the Rathdrum facility, in violation of 40 CFR § 265.37.

11. No efforts were made to develop a contingency plan for the Rathdrum facility, in violation of 40 CFR § 265.51(a).

12. No manifest records were retained or kept at the Rathdrum facility, in violation of 40 CFR § 265.71.

13. No operating records were maintained or kept at the Rathdrum facility, in violation of 40 CFR § 265.71.

14. No closure plan was developed, submitted or kept at the Rathdrum facility, in violation of 40 CFR § 265.112.

ORDER

Accordingly, it is hereby ORDERED AND ADJUDGED as follows:

1. The Respondent Warren Bingham shall pay to EPA the following amounts as civil penalties which are hereby assessed and imposed against the said Respondent:

A. Fifteen thousand dollars (\$15,000.00).

1 2. The total of the foregoing imposed penalties is
2 \$15,000.00, which said amount shall bear no interest from the
3 date hereof.

4 3. The payment of these imposed penalties is hereby
5 suspended and deferred to July 30, 1986, at which time they shall
6 be due and payable together with all interest accrued thereon
7 without further proceedings, or notice, or Order herein EXCEPT as
8 otherwise provided in paragraph 4.

9 4. The suspended and deferred payment portion of the
10 penalties imposed above shall be wholly excused automatically
11 on the said date together with all interest accrued
12 thereon without further proceedings herein if the affirmative
13 conditions or events specified in Attachment 1 do occur on time,
14 and if none of the negative conditions or events specified in
15 Attachment 2 occurs prior to the date specified in paragraph 3.

16 5. The suspended and deferred payment portion of the
17 penalties imposed above together with all interest accrued thereon
18 shall become immediately due and payable at an earlier date, namely,
19 upon the non-occurrence of any of the required conditions or events
20 specified in Attachment 1, or upon the occurrence of any one of the
21 negative conditions or events specified in the Attachment 2.
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1 6. The Respondent shall cause to be filed herein
2 affidavits which verify (on the basis of first hand knowledge of an
3 appropriate individual) the extent to which (if at all) the conditions
4 specified hereinabove have or have not been met or fulfilled as of
5 the date of such affidavit, as follows:

6 A. Whenever a negative condition listed in Attachment
7 2 occurs, an affidavit to that effect shall be promptly filed.

8 B. At least two business days prior to July 30,
9 1986, affidavit(s) shall be filed addressing each condition specified
10 in Attachments 1 and 2 (with the result that the payment of the
11 penalties remains deferred, or else the penalties become
12 payable, together with interest thereon as provided hereinabove).

13 7. By deferring payment of penalties adjudged herein,
14 the burden of proving that payment of those penalties remains
15 deferred and suspended is hereby placed upon Respondent Warren
16 Bingham.

17
18 8. EPA shall file herein a total satisfaction of this
19 Order if, as, and when any such total satisfaction occurs.


20 9. By stipulation signed by them and filed herein,
21 the parties hereto may change and extend any time period set forth
22 in Attachment 1, or the end date of the Order as stated in paragraph
23 3, above. Upon the filing of such a stipulation herein, the
24 said changes are thereupon incorporated into this Order automatically,
25 as part thereof.
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1 10. This Order, and any actions taken to satisfy this
2 Order, or any conditions therein (whether such action is the payment
3 of penalties or the completion or implementation of the closure
4 plan) shall not operate to relieve Respondent Bingham from any
5 further liability under the Resource Conservation and Recovery Act
6 of 1976, or the Comprehensive Environmental Response, Compensation
7 and Liability Act of 1980. If the deferred penalties described in
8 paragraph 2 above become due and owing, and are paid by Respondent
9 Bingham, Respondent Bingham may additionally be subject to imposi-
10 tion of a civil penalty upon notice and hearing of not more than
11 \$25,000 for each day any closure plan is not submitted, or any
12 approved plan is not implemented, pursuant to 42 U.S.C. § 6928(c).
13 Further liability may also include an additional administrative
14 order for failure to submit a closure plan after termination of
15 interim status at the Rathdrum facility, pursuant to 40 CFR §
16 265.112(c)(1), proposing civil penalties and ordering the submission
17 and implementation of a closure plan.
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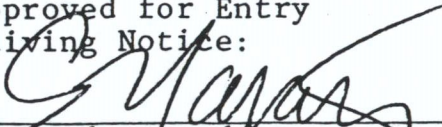
11. All written submissions under this Order shall be addressed to:

Kenneth Feigner, Waste Management Branch Chief
EPA Region 10, M/S 533
1200 Sixth Avenue
Seattle, Washington 98101

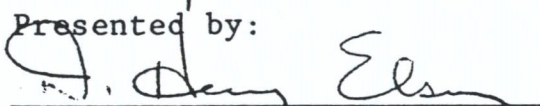
IT IS SO ORDERED this 20th day of June, 1985.


EPA REGIONAL ADMINISTRATOR

Stipulated, Agreed, and
Approved for Entry
Waiving Notice:


Respondent and/or
Of Attorneys for Respondent

Presented by:


Of Attorney for EPA

6/13/85

ATTACHMENT 1

Affirmative Conditions

1. Not later than 60 calendar days after the date of this Order (but excluding the date hereof), Respondent Warren Bingham will submit either:

a. a written closure plan to EPA Region 10 for the Rathdrum hazardous waste management facility pursuant to all applicable parts of 40 CFR Part 265.110 - 265.120, Subpart G (1984);

or

b. written evidence to EPA Region 10 that Respondent has used his best efforts to fulfill 1.a. above.

2. If Respondent Bingham does not submit a written closure plan under part 1.a. above, but does submit written evidence under part 1.b. above; Respondent Bingham shall, not later than 120 calendar days after the date of this Order (but excluding the date hereof), submit a written closure plan to EPA Region 10 for the Rathdrum hazardous waste management facility pursuant to all applicable parts of 40 CFR § 265.110 - 265.120, Subpart G (1984).

3. Respondent Bingham will comply fully with all provisions of 40 CFR § 265.112(d) regarding any EPA approval, modification, or disapproval of any closure plan Respondent Bingham submits.

4. Immediately upon approval or modification of the

1 closure plan by EPA Region 10, Respondent Bingham will
2 complete implementation of the approved or modified written closure
3 plan not later than 180 calendar days after the date of approval or
4 modification (but excluding the date of approval or modification).

5 5. Respondent Bingham will submit to EPA Region 10 a
6 certification of closure which complies with 40 CFR § 265.115,
7 after implementation of the closure plan is complete for the Rathdrum
8 hazardous waste management facility.
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ATTACHMENT 2

Negative Conditions

1. The sale or transfer of any part of the Rathdrum facility without Respondent Bingham procuring the written promise of the prospective or immediate transferee (enforceable by EPA) to perform all decretal terms and provisions of this Order shall not occur any time before implementation of the closure plan described in Attachment 1 is complete.

ATTACHMENT 3

Description of the Facility

That portion of the Tracts 17 and 24, Plat No. 2, GREENACRES IRRIGATION DISTRICT, Kootenai County, Idaho, according to the plat thereof recorded in Book B of Plats at Page 51, records of Kootenai County, Idaho, described as follows:

COMMENCING at the Northeast corner of said Tract 24; thence, North $89^{\circ}32'45''$ West along the North line of said Tract 24, 208.0 feet to the Southwest corner of land described in the deed to Sam Green and wife recorded October 26, 1961 in Book 187 of Deeds at Page 216; being the TRUE POINT OF BEGINNING; thence, South $10^{\circ}26'45''$ East 241.15 feet to a point on the Northwesterly line of State Highway 53; thence, South $49^{\circ}20'$ West along said Northwesterly line 209.0 feet to an intersection with the Easterly line of land described in the deed to Theodore Day and wife recorded June 2, 1978 in Book 291 of Deeds at Page 449; thence, North $4^{\circ}24'$ West along said Easterly line, 408.0 feet to the most Southerly Southwest corner of land described in the deed to Theodore Day and wife recorded April 21, 1978 in Book 290 of Deeds at Page 484; thence, South $89^{\circ}32'45''$ East along the South line of said Day land, 147.1 feet to a point on the West line of land described in said deed to Sam Green and wife above mentioned; thence, South $0^{\circ}24'$ West along said West line, 31.5 feet to the TRUE POINT OF BEGINNING.

duplicate 6/7/83

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BEFORE THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Region 10
1200 Sixth Avenue
Seattle, Washington

IN THE MATTER OF:

Arrcom, Inc., Drexler Enterprises,
Inc., George W. Drexler, Terry
Drexler, Inc., Western Pacific
Vacuum Service, Golden Perm Oil
Co., Terry Drexler, Richard Cragle,
Ronald Inman, W.A.(Alan)Pickett,
Thomas Drexler, and Warren Bingham,

Respondents.

RCRA Docket Nos.
X83-04-01-3008 and X83-04-02-3008
(Consolidated)

COMPLAINANT'S PROPOSED FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND SUPPORTING MEMORANDUM

D. Henry Elsen
Assistant Regional Counsel
EPA Region 10

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1 I. Introduction

2 This is a proceeding under Section 3008 of the Solid Waste Disposal
3 Act, as amended by the Resource Conservation and Recovery Act of 1976, as
4 amended in 1980 (hereinafter "RCRA" or "the Act"), 42 U.S.C. § 6921
5 et seq. (1982). On May 10, 1983, the United States Environmental Protection
6 Agency (EPA) issued two Complaints, Compliance Orders, and Notices of
7 Opportunity for Hearing to several named respondents, concerning the handling
8 of used oil at two separate facilities.

9 After amendment, complaint X83-04-01-3008 alleges that George W.
10 Drexler; Arrcom, Incorporated; Drexler Enterprises, Incorporated; and Terry
11 Drexler; Terry Drexler, Incorporated; Western Pacific Vacuum Service; and
12 Golden Penn Oil Company all operated a new facility for the storage of hazardous
13 waste in Tacoma, Washington without obtaining a permit for its operation.
14 The complaint also named Ron Inman and Richard Cragle as owners of this
15 facility. EPA asserts that this violation of the Act merits a penalty assess-
16 ment of \$13,500, jointly and severally, against all of these named respondents.

17 Complaint X83-04-02-3008 charges George W. Drexler; Thomas Drexler;
18 William A. Pickett; Arrcom, Incorporated; and Drexler Enterprises, Incorporated
19 as operators of an unpermitted and improperly maintained hazardous waste
20 storage and disposal facility near Rathdrum, Idaho. Warren Bingham was also named
21 in the complaint as the owner of this facility.^{1/} The complaint alleged
22 violations in three basic areas -- a.) disposal (as opposed to storage) of
23 hazardous wastes without a permit or interim status, b.) submitting a part A
24 permit application for storage of hazardous wastes without obtaining the owner's
25

26 ^{1/} Mr. Bingham's hearing on this matter was severed from this proceeding by
27 motion and order dated April 30, 1985. Mr. Bingham has since admitted liability
28 and signed a consent agreement and order, which obligates Mr. Bingham to implement
an approved closure plan at the facility. This does not affect complainant's action
FINDINGS, CONCLUSIONS AND MEMORANDUM- Page 1

1 signature, and c.) numerous violations of regulations governing the operation of
2 a hazardous waste storage and disposal facility operating under interim
3 status. EPA asserts that a penalty of \$73,500 is warranted for these violations,
4 and asks that this amount be assessed against the five remaining respondents,
5 jointly and severally.

6 A hearing was held on these matters on April 30, 1985, in
7 Seattle, Washington, before the Honorable Thomas B. Yost, EPA Administrative
8 Law Judge. Complainant EPA submits this memorandum in accordance with 40 CFR
9 § 22.28, the Consolidated Rules of Practice, and with the Court's Order of
10 May 9, 1985.

11 II. Argument

12 A. Statutory Framework -- RCRA

13 The Resource Conservation and Recovery Act, as amended in 1980
14 is a Congressional attempt to regulate the handling and generation,
15 transportation, and treatment, storage, and disposal of hazardous wastes,
16 from "cradle to grave." It reflects Congressional concern with the growing
17 volume of hazardous wastes and discarded material in the United States. It
18 was intended as a "comprehensive regulatory program, closing the 'last
19 loophole' in environmental regulation." United States v. Johnson & Towers,
20 Inc., 741 F.2d 662 (3d Cir. 1984). Subtitle C of RCRA, Sections 3001 through
21 3010, 42 U.S.C. §§ 6921-6930, establishes the basic framework for this
22 regulation.

23 Section 3001 of the Act, 42 U.S.C. § 6921, requires the Administrator
24 to promulgate regulations identifying and defining hazardous wastes by particular
25 substance (listed wastes) or by characteristics (characteristic waste).
26 These regulations are found at 40 CFR § 261.1-.33. In Section 3010, 42 U.S.C.

1 § 6930, handlers of hazardous wastes are required to notify EPA of such activity
2 within ninety days after the classification of their waste as hazardous
3 wastes. Section 3005(a) of the Act, 42 U.S.C. § 6925(a), prohibits the
4 ownership and/or operation of a hazardous waste facility for disposal, treatment
5 or storage without obtaining a permit. Section 3005(e) allows the operation
6 of such facilities if they existed prior to November 19, 1980, provided the
7 facility notifies EPA of such activity, and files a proper Part A permit
8 application. Facilities operating under this section are given interim
9 status. However, new facilities which come into existence after November 19, 1980,
10 cannot operate until fully permitted by EPA. Section 3005 also requires the
11 promulgation of regulations reflecting these requirements. Those regulations
12 are found at 40 CFR Parts 124 and 270 (1984). (Part 270 regulations were
13 formerly codified at 40 CFR Part 122 (1981 & 1982)) Section 3004 of the
14 Act, 42 U.S.C. § 6924, requires the Administrator to promulgate regulations
15 establishing performance standards for hazardous waste storage, treatment,
16 and disposal facilities. Those regulations are found at 40 CFR Parts 264
17 (new facility standards) and 265 (interim status standards).

18 Enforcement of these provisions is provided in Section 3008 of the
19 Act, 42 U.S.C. § 6928. Under Section 3008, EPA is authorized to issue
20 administrative complaints seeking civil penalties for violations of Subpart C
21 and accompanying regulations of up to \$25,000 per violation per day, and
22 administrative compliance orders requiring immediate compliance with the
23 requirements of Subpart C of RCRA, and its accompanying regulations.

24
25 B. Regulatory Framework--Defining a Hazardous Waste.

26 Hazardous wastes which are subject to regulation under RCRA
27 Subtitle C are defined in 40 CFR Part 261. A substance must first be a solid

1 waste to be a hazardous waste, according to the definition of hazardous
2 waste found in Section 1004(5) of the Act, 42 U.S.C. § 6903(5). Solid waste
3 is defined in 40 CFR § 261.2, and includes refuse [§ 261.2(a)] and "other
4 waste material" in liquid form resulting from commercial activities, which
5 has served its original intended use and sometimes is discarded [§ 261.2(b)].
6 The preamble to these regulations, found at 45 F.R. 33084-33119 (May 19,
7 1980), makes clear that used oil was intended to be included in this definition.
8 It states:

9 The first category of materials which are regulated as
10 "wastes" under RCRA are "garbage, refuse (and) sludge
11 [Section 1004(27)]. These materials are almost always
12 thrown away, and it is clear from both Section 1004(27)
13 of the statute and its legislative history (H.R. Rep. at
14 2-4; S.Rep. at 5) that Congress regarded them as "wastes"
15 regardless of their intended end use.

16 Of those materials which are not garbage, refuse or
17 sludge, it also seems clear that any material which is
18 intended to be or is in fact thrown away, abandoned or
19 destroyed is a "waste." As noted above, there appears to
20 be no disagreement among commenters on this point and of
21 course it is fully supported by the legislative history
22 of RCRA.

23 Of those materials which do not fall into either of
24 these two categories--i.e., materials other than garbage,
25 refuse or sludge which are (or are intended to be) used,
26 re-used, recycled or reclaimed--it appears that there are
27 two types of substances which Congress intended to be
28 regulated as "wastes" under RCRA.

The first are materials like waste solvents, paint
wastes, waste acids, used drums and waste oil. These are
what Congress referred to in the legislative history as
"post-consumer wastes" or wastes which have "served their
intended purpose" (H.R. Rep. at 2 and 9). While
acknowledging that some of these post-consumer wastes
might be recycled (see H.R. Rep at 3, 10), Congress also
recognized that they were sometimes discarded, and
therefore were "wastes" (see H.R. Rep. at 9-10).
(Emphasis added)

The preamble also evidences EPA's intention that used oil, in
addition to being a solid waste, could be considered a hazardous waste
in certain circumstances. Solid waste, such as used oil, is

1 considered a hazardous waste when it is a mixture of a solid waste and a
2 listed hazardous waste, found in 40 CFR Subpart D. [See, 40 CFR §261.3(a)(2)
3 (1981) and 40 CFR §261.3(a)(2)(iv) (1982 - 1984)2/. Such substances become
4 hazardous wastes from the time the listed hazardous waste is first added to
5 the solid waste [40 CFR §261.3(b)(2) (1981 & 2)], and remains a hazardous
6 waste until it is specifically excluded by a special rulemaking petition to
7 the Administrator, or until the substance is destroyed. [40 CFR §261.3(d)(2)
8 (1981 & 1982)].

9 A policy document written and used by EPA is relevant to this
10 discussion. In a published enforcement guidance document titled "RCRA
11 Enforcement Guidance: Burning Low Energy Hazardous Wastes Ostensibly for
12 Energy Recovery Purposes", 48 F.R. 1157-1161 (March 16, 1983), EPA again
13 stated its intention to treat used fuels, such as used oil, contaminated with
14 spent solvents as hazardous waste, subject to appropriate enforcement action.
15 In discussing when such used oil can be considered hazardous waste, the document
16 reads:

17
18 Automotive oils do not typically come into contact with
19 solvents when used. . . .
20 If fuels (such as used oil) contain significant concentrations
21 of low energy organic compounds (such as spent solvents)
22 not ordinarily present in virgin or unadulterated secondary fuels,
23 this should be sufficient to determine these toxicants were added
24 as wastes (and are therefore subject to hazardous waste regulation).

25 48 F.R. at 11159. (Emphasis and parenthetical comment added)

26 2./ The 1982 changes and renumbering of this regulation reflect the addition
27 of some exceptions to the definition not relevant here.

1 All samples relevant to these actions contained significant levels of organic
2 compounds associated with chlorinated and non-chlorinated solvents, EPA Hazardous
3 Waste Nos. F001-F005, at quantities well above those normally found in virgin
4 oil or unaltered waste oil. See, Composition and Management of Used Oil
5 Generated in the United States, EPA Document 530-SW013 (November 1984).

6 C. Regulatory Framework--New Facility Permitting Requirements.

7 The permitting regulations required by Section 3005 of RCRA
8 are found at 40 CFR Part 270 (Part 122 during 1981 and 1982). Hazardous
9 waste management facilities which were in existence prior to November 19,
10 1980, are allowed to operate until final administrative disposition of its
11 permit application, provided the facility operator has provided timely notice
12 and filed a legitimate Part A application form. 40 CFR §270.1(b) and §270.10
13 [formerly §§122.21(c) and 122.22]. However, a distinction is made between these
14 facilities and new hazardous waste management facilities. New hazardous
15 waste management facilities are defined in 40 CFR §270.2 [formerly §122.22(b)]
16 as any facility which began operation after November 19, 1980. Unlike interim
17 status facilities, these facilities are absolutely prohibited from operating
18 in any manner until a submission of Part A and Part B permit applications ,
19 and final agency action through issuance of a RCRA permit to these facilities.
20 42 U.S.C. §6924(a); Appendix I of 40 CFR Part 260, paragraph 15; 40 CFR
21 §§270.10(b) and 270.10(f) [formerly §122.22(b)].

22 The obligation to obtain proper permits for a new facility
23 rests with owners and operators of such facilities. (See discussion in part
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III. B. 2, below) Owners and operators are defined in 40 CFR § 260.10.

D. Regulatory Framework--Interim Status Permitting Requirements and Standards.

Existing hazardous waste management facilities, or those which operated prior to November 19, 1980, are eligible for interim status, as described above. Interim status facilities may handle only those hazardous wastes which are indicated on the facility's Part A permit application, 40 CFR §270.71(a)(1) and §270.72 [formerly §122.23(b) & (c)]. Such facilities may not employ processes not specified on its Part A permit application--i.e., an interim storage facility cannot dispose of hazardous wastes. 40 CFR §270.71(a)(2) [formerly §122.23(b)]. Part A applications must contain the signature of the owner of the facility, as well as the operator. 40 CFR §270.10(b) [formerly §122.4(b)].

Standards applicable to hazardous waste management (HWM) facilities which qualify for interim status are found at 40 CFR Part 265. The standards apply to any existing (i.e., in existence before November 19, 1980) HWM facility, whether or not the facility owners and operators have notified properly, or submitted a proper Part A permit application. 40 CFR §265.1(b).

Subpart B of these standards contain general facility standards, setting basic requirements for the operation of any HWM facility. These include requirements for development and implementation of written inspection schedules (§265.15), development of a personnel training regimen, with written records reflecting this training (§265.16); and maintenance of a fence or other barrier system to control access to the facility (§265.14). Central to the "cradle to grave" scheme of RCRA is the Subpart B regulation requiring a written waste analysis plan, which provides for the regular, representative sampling

FINDINGS, CONCLUSIONS AND MEMORANDUM - Page 7

1 of wastes received by the facility (§265.13). This requirement ensures
2 accurate tracking of hazardous wastes from their generation to their disposal
3 or re-use.

4 Subpart C of the Part 265 regulations require facilities to perform
5 basic safety exercises at a HWM facility. This includes operating the facility
6 such that unplanned releases do not occur unnecessarily (§265.31), having an
7 external communication device capable of summoning emergency assistance and
8 having fire control equipment [§265.32(b) and (c)], and attempting to make
9 contingency arrangements with local authorities (§265.37).

10 Subpart D of Part 265 addresses the need to develop a written
11 contingency plan, describing procedures to be implemented when a emergency
12 arises at the facility (§265.51).

13 Subpart E of Part 265 contains important requirements regarding
14 manifests under the RCRA system. Section 265.71(b)(5) mandates that a facility
15 retain copies of any manifests which accompany shipments of hazardous waste
16 to the facility. These records must be kept for at least three years from the
17 date of delivery. The facility must maintain a written operating record,
18 describing quantities of hazardous waste received, and eventual disposition of
19 the wastes (§265.73).

20 Finally, Subpart G of Part 265 requires an interim status facility
21 to submit and maintain a closure plan for any facility (§265.112). All of
22 these requirements are applicable to any interim HWM facility, including
23 storage facilities.

24 The obligation to comply with these regulations, in terms of \$ 3008
25 civil penalty orders, rests with owners and operators of HWM facilities.
26

E. Regulatory Framework--The Reuse/Recovery Exception.

Although material which is sometimes reused or recycled is solid waste, and can be hazardous waste (see part II.B. above), in accordance with Congressional policy encouraging reuse and recycling of waste material, certain hazardous waste operations involving reuse and recycling are excluded from regulation under 40 CFR §261.6. However, the exclusion is not a complete exclusion. It applies in limited circumstances and in limited ways.

First, as the preamble to §261.6 regulation makes clear, sham recycling or recovery activities, such as the burning of hazardous wastes or hazardous waste constituents which have little or no heat value, are not within the scope of the reuse exclusion. 45 F.R. 33091-33094 (May 19, 1980). A reuse must be "beneficial" or "legitimate" to qualify for this exclusion. As the published enforcement guidance document makes clear, the mixing of organic solvents, such as those listed under 40 CFR § 265.31, Nos. F001-F005, with waste fuel such as oil for burning or road oiling is not considered a beneficial or legitimate reuse of these substances, because of the low energy value associated with most of these substances. 48 F.R. 11157-11161 (March 18, 1983). See, In the Matter of Ashland Chemical Co., Docket Nos. 9-83-RCRA-10 & 9-83-RCRA-40, pp. 34-36 (June 21, 1984).

Second, even if an operation is considered as one leading to beneficial or legitimate reuse or recovery, the §261.6 exclusion is only a partial exclusion. Section 261.6(b) states that hazardous wastes that are considered hazardous wastes because they contain a listed hazardous waste found at §261.31 or §261.32 (as is the case here) are subject to specific storage requirements, including the permitting requirements of Part 270 (formerly Part 122) and the operating standards of Subparts A through L of Part 265. All violations charged here are within those requirements. Thus,

1 even if the activities conducted at the two sites are determined to involve
2 legitimate reuse or recovery, the statutory and regulatory obligations at
3 issue here are applicable to these facilities.

4 Lastly, operation of a reuse/recovery facility does not excuse or
5 condone sloppy and/or intentional practices which result in the placement
6 of significant quantities of hazardous wastes upon the ground and into the
7 environment. Such practices are disposal practices, as defined at 40 CFR
8 § 260.10, not reuse or recovery, and facilities at which these practices take
9 place are subject to the disposal facility permitting requirements of section
10 3005 of the Act and 40 CFR § 270 (formerly part 122). Hazardous wastes
11 handled in such a manner are not reused or recycled, beneficially or otherwise.
12 Section 261.6 has no application to activities of this kind.

13 III. The Tacoma Site--X83-04-01-3008

14 A. Factual Background at the Site.

15 Respondents Arrcom, Inc., and Drexler Enterprises, Inc. 3/ are
16 corporations responsible for beginning the operation of a business involving
17 storage of used oil and solvents located at 1930 "C" Street in Tacoma,
18 Washington. The President of both corporations was respondent George W. Drexler.
19 (Transcript p. 271, 290) 4/ Respondent Terry Drexler, Incorporated was a
20 corporation doing business as Golden Penn Oil Company, and Western Pacific
21 Vacuum Service. (R231) Respondent Terry Drexler was the president of all these
22 corporations and organizations. (R231) They subleased the 1930 "C" Street storage
23 facility from Arrcom. (R232-4) Respondents Richard Cragle and Ronald Imman are
24

25 3./ Arrcom, Inc. and Drexler Enterprises, Inc. are considered interchangeable
26 corporations without distinct existences by their President, George Drexler.
27 (Transcript, p.271) The two corporations will be collectively referred to as ..
28 "Arrcom" throughout this portion of the brief.

4./ Hereinafter, references to the transcript will be labelled R_____.

1 individuals who are property owners and lessors of the facility. (R220, Answer of
2 Inman and Cragle, p.1)

3 Respondents Cragle and Inman leased a portion of a warehouse facility
4 belonging to them in August of 1981, to Empire Refining Company, another
5 corporation headed by George W. Drexler. (R220-221) The facility consists
6 of a cemented or asphalted yard, under which are three underground storage
7 tanks. (R116-118, 222-224) An unused loading rack and a small shed are also
8 located on the premises. The premise address is 1930 "C" Street in Tacoma,
9 Washington, an industrial area within the city limits of Tacoma, surrounded by
10 other industrial facilities. (R116-117, R221-225.)

11 Empire/Arrcom began using the facility in August of 1981, for the
12 storage of used oil and other material. (R273-274, 277-278) On December 3,
13 1981, respondent George Drexler admitted to EPA permitting person Linda
14 Dawson, that the facility was used for the storage of waste oil and solvents
15 (Complainant's Exhibit 9--Idaho; R61-63). Alan Pickett, an employee of
16 Arrcom, Inc. and acting secretary of Arrcom, Inc. and Drexler Enterprises,
17 Inc. (R269; Answer of George Drexler, p. 2 (Attachment I), confirmed this in
18 a conversation held on the same day (C. Exh. 8--Idaho). After written requests by
19 EPA, on January 6, 1982, Arrcom/Drexler submitted a notification of hazardous
20 waste activity, which listed characteristic ignitable waste in the form of used oil
21 (Haz. Waste No. D001), and listed, nonhalogenated, organic spent solvents
22 (Haz. Waste No. F003 and F005) (Cmplt. Ex. 1--Tacoma) as hazardous waste
23 which was handled at the facility. The notification indicated that this
24 hazardous waste material was stored, treated or disposed of at the 1930 "C"
25 Street facility. (Id.) A Part A permit application was submitted by Arrcom
26 at the same time. It stated that 30,000 gallons of spent solvents and 500,000..
27 gallons of used oil were estimated to be stored at the site on an annual
28 FINDINGS, CONCLUSIONS AND MEMORANDUM - Page 11

1 basis, in the underground storage tanks, presumably as a mixture (Omplt. Ex.
2 3--Tacoma). It also stated that the starting date for the facility was
3 August 1, 1981 (Id., p. 3). Both the notification and the Part A permit
4 application listed respondent George Drexler as the facility contact for the
5 1930 "C" Street facility. (Id.)

6 The Part A permit application was rejected by EPA as incomplete.
7 (R74-76) Numerous deadlines were set for resubmittal of all proper forms.
8 If this was not possible, Arrcom was given the option of submitting and
9 implementing a closure plan for the facility, pursuant to 40 CFR Part 265.
10 (Omplt. Exh. 5--Tacoma). (At the time, it was not clear to EPA that the facility
11 was a new facility which could not qualify for interim status) Subsequent to this
12 letter exchange, Arrcom subleased the facility to Terry Drexler and Terry Drexler,
13 Inc., presumably to continue the same storage activities involving used oil and
14 spent solvents. (R232-4) To date, neither Arrcom nor its subleasee have
15 completed the necessary application forms before a new facility Part B permit
16 can issue, nor have they submitted a closure plan. (Omplt. Ex. 48, p. 24-26)

17 EPA conducted an inspection at the facility on June 9, 1982.
18 Respondent Terry Drexler accompanied EPA inspectors during this visit. Terry
19 Drexler stated that his corporation was currently subleasing the facility from
20 Arrcom, for use as a storage facility. (R116-118, Brown deposition p. 10-12;
21 Omplt. Ex. 8 and 10--Tacoma) Contrary to later assertions by Terry Drexler,
22 waste oil and spent solvents were actively placed into the tanks by Terry
23 Drexler and his corporation prior to this inspection. (R116-124, 232-
24 4, 250-2)

25 A sample of the oil in one of the underground tanks was taken by
26
27

1 EPA inspector William Abercrombie. (R117-120) In a followup letter to the
2 inspection dated July 27, 1982, Terry Drexler was informed that if the presence
3 of listed wastes was found in the used oil, all requirements under 40 CFR
4 §261.6(b) would be applicable. (Cmpt. Exh. 11--Tacoma, p.2) Although the
5 letter was primarily concerned with a proposed treatment operation which
6 never occurred, the letter repeatedly advised Terry Drexler that proper
7 permitting requirements had to be completed prior to the commencement of any
8 storage operation at the facility. (Id., p. 1 & 3) A copy of this letter
9 was sent to respondent Richard Cragle, the property owner. (Id., p. 4)

10 Analysis of the used oil sample was done by Washington State
11 Department of Ecology laboratories, and by EPA regional laboratories. The
12 State analysis revealed that the waste oil flash point, or temperature at
13 which the material would ignite, was below 140° F. (Cmpt. Ex. 10--Tacoma,
14 p. 5) Analysis at EPA laboratories revealed the presence of several hazardous
15 wastes, including toluene, a listed hazardous waste at 40 CFR § 261.31, at
16 1.7×10^7 ug/L, or 1700 parts per million (ppm), (Cmpt. Exh. 7--Tacoma), as
17 well as trace amounts of ethylbenzene and methylene chloride. This is a
18 significant concentration of toluene--well above the mean of 500 ppm found in
19 waste oil. See, Composition and Management of Used Oil Generated in the
20 United States, EPA Doc. No. 5630SW-013 (November 1984). Analysis also revealed
21 the presence of naphthalene bis(2-ethylhexyl)phthalate, and di-n-octyl phthalate
22 in significant quantities. These are listed hazardous wastes under § 262.33.
23 Respondent Terry Drexler stated that suppliers of the oil which was stored in
24 the tank added this solvent to their oil (R241-43).

25 No further permit applications were ever received concerning the
26 "C" Street facility. The facility is still used by Terry Drexler as a storage

1 facility. (R235-6) EPA issued a Complaint and Compliance Order in the matter
2 on May 10, 1983, informing all parties that continued operation of the facility with
3 substances such as were found in 1982 was illegal. To date, no closure plan
4 or further permit applications have been submitted or implemented for the
5 facility. It continues to operate illegally to this very day.

6 B. Respondents Have Violated the New Facility Permitting
7 Requirements.

8 One of the most basic and fundamental requirements of the RCRA
9 legislative scheme is the Congressional mandate that no HWM facilities can
10 operate without obtaining a permit from the appropriate regulatory agency.
11 Section 3005 of the Act reflects this basic mandate by stating:

12 (T)he treatment, storage, or disposal of any such hazardous
13 waste is prohibited except in accordance with such a permit.
42 U.S.C. §6924(a).

14 The only exception to this ban on hazardous waste activity until full permitting
15 is completed is for those facilities that meet the carefully defined special
16 condition of interim status, as clearly stated in Section 3005(e), 42 U.S.C.
17 §6925(e). The 1930 "C" Street facility began operation well after the November
18 19, 1980, cut-off date found there. Thus, the operation of the 1930 "C"
19 Street facility as a storage facility for used oil contaminated with hazardous
20 wastes was and is simply illegal, and continues to be illegal to this day.
21 George Drexler and his various corporate identities operated the facility in
22 late 1981 and early 1982. They admitted, in spoken word and written word,
23 that they stored waste oil and spent solvents at 1930 "C" Street prior to
24 recycling efforts elsewhere. This makes them liable for the illegal operation
25 of a hazardous waste management storage facility without a permit. This
26 operation was turned over to Terry Drexler and his various corporate identities:
27

1 They admitted that they used the facility to store waste oil which was contaminated
2 with spent solvents. Laboratory analysis of oil belonging to Terry Drexler
3 confirmed this admission. They are also liable for the illegal operation of
4 a hazardous waste management storage facility, without a permit. Richard
5 Cragle and Terry Inman were and are the owners of this facility. Under RCRA,
6 they are liable for the same illegal activities. No defense argued by respondents
7 can prevent this liability. Their leasing of premises to the remaining respondents
8 was itself such participation and/or aiding and/or abetting as to result in
9 joint and several liability on Cragle and Inman, as explained later herein.

10 1. Corporate Liability

11 Corporations leased and subleased the "C" Street facility,
12 but both corporate entities and individual officers of those corporations are
13 charged here. Section 3008(a) of the Act, 42 U.S.C. §6928(a) authorizes
14 administrative complaints against "any person . . . in violation of this
15 subchapter." "Person" is defined in 42 U.S.C. § 6903(15) as, among other
16 things, an individual or a corporation. The permitting requirements of
17 Section 3005 and 40 CFR Part 270 are applicable to both operators and owners
18 of HWM facilities. As long as the persons charged here meet the definition
19 of operator found at 40 CFR §260.10, they are liable for violations--whether
20 they are corporate entities or individuals.

21 The concept that corporate entities and individuals can be liable
22 for penalties for the same acts has long been recognized in federal law
23 for a number of years. E.g., United States v. Dotterwich, 320 U.S. 277
24 (1943); United States v. Wise, 370 U.S. 405, 408 (1962); United States v.
25 Hilton Hotels Corp., 467 F.2d 1006, 1004 (9th Cir. 1972), cert. denied, 409
26 U.S. 1125 (1973); United States v. Beusch, 596 F.2d 871, 877 (9th Cir. 1979);

1 70 C.J.S. §6, Penalties. This principle is especially appropriate for violations
2 of public health and safety regulatory statutes, such as RCRA. See, Dotterich,
3 supra, 320 U.S. at 283. This principle applies to actions for civil penalties
4 issued by regulatory agencies. E.g., United States v. Danube Carpet Mills, Inc.,
5 737 F.2d 988 (11th Cir. 1984); United States v. Appendagez, Inc., 560
6 F.Supp. 50 (Int.Ct. of Trade 1983); United States v. Bestline Products Corp.,
7 412 F.Supp. 754 (N.D. Calif. 1976). The underlying reasoning for this was
8 articulated by the Bestline Court in the following manner:

9
10 It would seem in cases of this sort to be a futile gesture
11 to issue an order directed to the lifeless entity of a
12 corporation while exempting from its operation the living
13 individuals who were responsible for the illegal practices.

14 Id., 412 F.Supp. at 763. Individual liability is particularly appropriate in
15 closely held corporations, which are essentially controlled by one person, as
16 here. Award Petroleum, Inc. v. Vantage Petroleum, Corp., 529 F.Supp. 269, 272
(E.D. N.Y. 1981).

17 Both corporate entities and actively involved individuals can be
18 charged as persons, if they are operators of HWM facilities, and both can be
19 found liable for civil penalties. The individuals charged in this action
20 were actively involved operators of the facility. George Drexler was the
21 president and sole shareholder of Arrcom. He was listed as the facility
22 contact on notification and Part A permit application forms. George Drexler
23 arranged the sublease of the facility to Terry Drexler, and George Drexler
24 met with EPA officials on July 15, 1982, as the official representative of
25 Arrcom. George Drexler was an individual operator of the "C" Street facility,
26 who controlled the activities there during Arrcom's reign.

1 Likewise, Terry Drexler was (and is) the overall person in charge
2 at the "C" Street facility, after Terry Drexler, Inc. subleased the facility.
3 He was the president of Terry Drexler, Inc. He met EPA officials at all
4 inspections. His testimony reveals that he controlled activities at the
5 facility, which led to the storage of hazardous waste at the facility. Terry
6 Drexler was (and is) an individual operator of the "C" Street facility, who
7 controlled the overall activities at the facility.

8 2. Liability of Putatively Non-Participatory Owners.

9 (a) Statutory Liability.

10 Under common law vicarious liability theories, lessors
11 who are not intimately involved in wrong-doing by the lessee are not liable for
12 the lessee's activities. Amoco Oil Co. v. EPA, 543 F.2d 270 (D.C. Cir. 1976)
13 (Clean Air Act); Restatement (2d) of Torts, 355-7 and 377-79. However, (1.)
14 that rule is subject to exceptions stated in the Restatement (2d) of Torts,
15 §§ 834, 876, 877(c), 877(d), 877(e), and 878, and (2) Congress has the
16 ability to specifically alter these normal rules, and impose liability
17 on non-participating owners. Amoco Oil, supra, 543 F.2d at 292-3. This was done
18 under certain portions of the Clean Water Act, and under the Superfund Law,
19 43 U.S.C. §§ 9601 et seq. Non-participatory landowner liability has been upheld
20 there. E.g., United States v. Argent Corp., 21 ERC 1354 (D. N.M. 1984).
21 Because of the heightened concern for the proper treatment of hazardous wastes,
22 the same thing was done under RCRA. This is shown by the plain language of
23 RCRA and by the legislative history which accompanied RCRA.

24 Section 3004 of RCRA requires the promulgation of regulations
25 "applicable to owners and operators" of HWM facilities, concerning standards
26 for operation of those facilities. Section 3005 mandates that an HWM facility
27 cannot operate without a permit, according to regulations established by the
28 FINDINGS, CONCLUSIONS AND MEMORANDUM - Page 17

1 Administrator. The regulations found at 40 CFR Part 270 (formerly Part 122)
2 state, at 40 CFR §270.1(c), "RCRA requires a permit for the treatment,
3 storage, or disposal of any hazardous waste, as identified or listed in 40
4 CFR Part 261. . . . Owners and operators of hazardous waste management units
5 must have permits during the active life (including the closure period) of
6 the unit," The plain language of the statute and regulations
7 promulgated thereunder demonstrate that Congress intended to impose a duty to
8 obtain permits on both the operator and the owner, if they are different persons.

9 Any question as to this intent can be put to rest by the legislative
10 history accompanying RCRA. House Report No. 94-1491 (Sept. 9, 1976) was the
11 major legislative report accompanying and explaining RCRA. In commenting on
12 requirements for HWM facilities, the report states:

13
14 It is the intent of the Committee that responsibility for
15 complying with the regulations pertaining to hazardous waste
16 facilities rest equally with owners and operators of
hazardous waste treatment, storage of disposal sites and
facilities where the owner is not the operator.

17 H.R. Rep. No. 94-1491, 94th Cong., 2d Sess. 28 reprinted in (1976) U.S. Code
18 Cong. & Ad. News 6266. (Emphasis added)

19 Congress specifically altered the common law rules of liability for
20 non-participatory owners, in the hazardous waste context, when it enacted RCRA.
21 Just as in cases under CERCLA and the Clean Water Act, that alteration should
22 be recognized here, and owners Richard Cragle and Ronald Inman should be
23 held jointly and severally liable for the violations alleged in this complaint,
24 on the basis of such statutory construction.

25 (b) Vicarious Liability For Regulatory Violations.

26 Wholly apart from the "statutory construction" basis for imposing
27 liability upon Cragle and Inman as "owners" under RCRA, there is an independent
28 FINDINGS, CONCLUSIONS AND MEMORANDUM - Page 18

1 basis for imposing vicarious liability upon them as collaborators in the
2 regulatory violations committed by the remaining respondents, at least where
3 hazardous substances, materials or wastes are involved.

4 The word "collaboration" is used to indicate that conduct not
5 amounting to "aiding and abetting" in the criminal law sense, and not amounting
6 to "conspiracy" in the civil or criminal sense, may nevertheless be a sufficient
7 basis for imposing vicarious liability. The principles set forth in the
8 Restatement of Torts, Second, §§ 834 (nuisance), 876(b) ("substantial assistance
9 or encouragement), 877(c) through (e) (collaborative acquiescence or assistance),
10 and 878 (common duty), when taken together, show that vicarious liability for
11 Federal regulatory violations occurring on premises may be imputed to the
12 lessors and/or owners of the premises when one, or any combination of, the
13 following factors demonstrates that the respondents have collaborated in the
14 violations, (which means simply that such vicarious liability is warranted by
15 facilitating and/or consciously supporting conduct if its imposition is
16 not inconsistent with, and in fact enhances, the Federal policies underlying
17 the requirements violated on the premises): (A) notice and/or knowledge (actual
18 or constructive) of the intended or probable activities on the premises; (B)
19 right to control contractually or otherwise the activities actually conducted
20 on the premises; (C) affirmative encouragement and/or assistance by the owner
21 facilitating use of the premises for the conduct from which violations arose;
22 and (D) tacit or passive approval, suffererance, allowance, or acquiescence
23 by the owner or lessor in the activities actually conducted.

24 The "nexus" for imposing liability vicariously upon the premises
25 owners or lessors, is not "fault" or "negligence" or "conspiracy" or "aiding
26 and abetting" (although any of those grounds may well suffice for imposing
27 such liability). Rather, the nexus lies in the ability of an owner or lessor

1 to inquire about prospective activity and to police what is engaged in in
2 fact rather than relying on mere "boiler-plate" clauses in lease or rental
3 agreements to the effect that the lessee or renter will "comply with all
4 applicable laws and regulations".

5 The principles of the cited sections impose liability strictly,
6 regardless of any "fault" as such on the owner's or lessor's part, and do not
7 articulate any specific affirmative duty for them to find out and remain
8 aware of what is going on in regard to the premises. Thus, an out of state
9 heir inheriting a warehouse might very well lease it by mail to lessees of
10 unknown repute, and because to the overall status and relation of such owner
11 to the prospective activities, no vicarious liability is incurred. Conversely,
12 the commercial lessor who "doesn't want to know" the details of what acti-
13 vities will transpire on the premises or who affects ignorance or naive
14 reliance on boiler-plate clauses in leases or rental agreements may very well
15 incur such vicarious liability as a "collaborator". That same commercial
16 lessor who fails to inspect and/or terminate a lease when he had the right to
17 do so may thereby become a collaborator. With the ubiquitous nature of
18 activities involving, as we now know, hazardous materials, substances, or
19 wastes, the owners of lands or buildings cannot pretend they are mere "demise
20 or bareboat charterers" deprived of control over the premises let as obviously
21 is the case with seagoing vessels.

22 Finally, it should be noted that the imposition of vicari-
23 ous liability on Cragle and Irman actually confers an incidental ~~a~~ benefit *on*
24 all the respondents in that a single overall penalty amount can be adjudged
25 jointly and severally against all the respondents, who then in turn may have
26 rights of contribution and indemnity against one another under State and/or
27 Federal law. If penalties are "allocated", no such rights can be asserted.

1 Admittedly, this tribunal lacks the jurisdiction to determine whether federal
2 rights of contribution and/or indemnity do exist in the premises because this
3 tribunal cannot adjudicate such private rights, but in cases of vicarious
4 liability that is the normal under state or Federal law result simply because
5 the vicarious liability is imposed strictly regardless of independent fault.

6 Counsel have not to date discovered any decided cases directly
7 discussing vicarious liability for Federal regulatory violations and must
8 rely upon the cited sections of the Restatement of Torts Second and the
9 foregoing analytical reasoning to support this segment of Complainant's
10 contentions.

11 3. Presence of a Hazardous Waste at the "C" Street Facility.

12 As explained in part II.B. above, used oil contaminated
13 with listed wastes found in 40 CFR §§ 261.31 and .33 is considered a hazardous
14 waste. This is especially true when the organic listed wastes are found in
15 significant quantities. George Drexler admitted to storing used oil and
16 spent solvents at the facility, presumably as a mixture. Forms sent to EPA
17 by George Drexler and Arrcom admitted and confirmed the presence of listed
18 wastes F003 and F005 in storage at the facility. Samples taken from Terry
19 Drexler's oil revealed the presence of significant amounts of toluene, a
20 listed waste under Hazardous Waste No. F005, and other spent solvents found
21 at 40 CFR §§ 261.31 and .33 Hazardous waste was present at the "C" Street
22 facility.

23 4. The Reuse/Recovery Exception.

24 As explained in part II.E. above and stated in 40 CFR
25 §261.6(b), the reuse and recovery of used oil contaminated with certain listed
26 hazardous wastes does not except it from the permitting requirements for HWM
27 storage facilities, which are alleged to be violated here.

1
2 5. The Plea Bargain Entered Into by Certain Respondents
3 Does Not Affect This Proceeding.

4 Respondents George Drexler and Terry Drexler entered into
5 an agreement with the United States Attorney for the Western District of
6 Washington on December 10, 1982, in which they agreed to plead guilty to
7 certain charges in exchange for several acts on the part of the government.
8 This agreement is attached (Attachment 2). As paragraph 5 of the agreement
9 makes plain, the government agreed to forego the prosecution of further
10 criminal charges based on respondent's business activities prior to Nov. 24,
11 1982. No mention is made of civil proceedings such as this one. EPA was not
12 a party to this agreement.

13 Mr. Stephen Schroeder, Assistant U.S. Attorney, supports this
14 interpretation of the agreement in a letter to EPA attorney, Barbara Lither
15 (Attachment 3). As he states, the plea bargain has no effect on any civil
16 actions which the United States may deem appropriate against the Drexlers.
17 This proceeding is not effected by the agreement.

18 C. The Proposed Penalty is Appropriate.

19 1. Statutory and Policy Considerations.
20 Section 3008(c) of the Act, 42 U.S.C. §6928(c), states:

21 Any order issued under this section . . . shall state with
22 reasonable specificity the nature of the violation and
23 specify a time for compliance and assess a penalty, if
24 any, which the Administrator determines is reasonable
25 taking into account the seriousness of the violation and
26 any good faith efforts to comply with the applicable
27 requirements.

28 Section 3008(g) of the Act, 42 U.S.C. §6928(g), states:

 Any person who violates any requirement of this subtitle
 shall be liable to the United States for a civil penalty
 in an amount not to exceed \$25,000 for each such violation.
 Each day of such violation shall, for purposes of this
 subsection, constitute a separate violation.

1 As of the date of issuance of the complaint, EPA had not formally adopted
2 penalty guidance for violations of the hazardous waste management regulations.
3 In December of 1980, EPA distributed a draft penalty policy which has not
4 been and will not be adopted by EPA as a formal document, but this document
5 has been acknowledged and used as guidance in many decisions on administrative
6 actions under the Act. 5/ The draft policy provides a description of the
7 various factors applicable in determining a penalty.

8 The draft policy asks the penalty assessor to do
9 three things. First, he or she must determine the appropriate class of the
10 violation. This is determined from a pre-determined classification of each
11 potential violation of the RCRA scheme, which divides the potential violations
12 into three classes. Each class carries a range of penalty amounts. Second,
13 the assessor must rate the damage or potential for harm of the particular
14 violation. Relevant to this determination is the intrinsic hazard of the
15 waste and the likelihood of exposure. Damage or potential for harm is ranked
16 as major, moderate or minor. Finally, the assessor is asked to assess the
17 conduct of the particular violator, in terms of the extent of deviation from
18 management standards or regulatory requirements. This also is ranked as
19 major, moderate or minor.

20 In this case, this assessment is reflected in Complots. Ex. 25--
21 Tacoma, a penalty matrix worksheet prepared by Michael Brown, EPA RCRA
22 compliance person, and in Mr. Brown's testimony found in pp. 27 through 29 of
23

24 5/ In the Matter of Cellofilm Corporation, Docket No. II-RCRA-81-114, August
25 5, 1982; In Re Fisher-Calo Chemicals and Solvents Corporation, Docket No. V-W-
26 81-R-002, October 8, 1982; In the Matter of Gulf and Western Manufacturing
27 Company, Docket No. 82-1026, November 29, 1982; In the Matter of Koppers Company,
28 Inc., Docket No. RCRA-III-012, June 21, 1983; In the Matter of Willis Pyrolizer
Company, RCRA Docket No. 83-H-002, December 5, 1983; In the Matter of L.H.,
Inc. and C & D Oil Co., Docket No. V-W-83-010, February 28, 1984.

1 his deposition transcript. Operating without a permit in this circumstance,
2 was judged to be a Class II violation. Although the policy asserts violations
3 of the statute proscription against operating without a permit is a Class I
4 violation, a subsequent guidance memorandum titled "Guidance on Developing Com-
5 pliance Orders Under Section 3008 of the Resource Conservation and Recovery Act",
6 July 7, 1981, ranked such a violation as a Class II violation in most cases.
7 Accordingly, Mr. Brown determined the violation to be a Class II violation.

8 As for the potential for damage classification, contaminated used
9 oil, both in storage and in burning, has long been a concern with EPA, and
10 has been specifically addressed in several preamble statements issued by EPA.
11 Some of The hazardous wastes involved, spent solvents, are listed in 40 CFR
12 §261.31 under Waste No. F001-F005. Such wastes are toxic and ignitable. As
13 stated in the document used to justify the listing of solvents, toluene, the
14 hazardous waste constituent found in the greatest amount here, is toxic by
15 ingestion, inhalation and skin absorption. Further, other hazardous wastes
16 found in significant quantities are listed as acutely hazardous wastes (H) in
17 40 CFR § 262.33.

18 In addition, the testing of the oil revealed a flashpoint below
19 140° F, for the waste oil. As described by the owner of the property, the
20 facility is located in an industrial center within the city limits of Tacoma,
21 Washington, and is surrounded by other buildings (R121-24, 221). Any fire or
22 explosion could cause significant damage. George Drexler himself colorfully
23 described an explosion and damage done to an earlier storer of allegedly
24 contaminated used oil at the facility (R276). In view of these factors, the
25 potential for harm was rightfully regarded as major.

26 Conduct was ranked as major here. According to Mr. Brown, this
27

1 ranking was based upon the fact that repeated attempts to seek compliance or
2 closure at the facility were futile (EPA Ex. 48, p. 28; Compt. Exh. 5--Tacoma).
3 The facility still has not been properly permitted or closed, as ordered by
4 EPA in the compliance order. Mr. Cragle and Mr. Inman, the owners, have
5 chosen not to terminate the lease at the facility, despite obvious breaches
6 related to unpermitted subleasing by Empire Refining Co. (R224-26). In view
7 of all this, the ranking of major for conduct in this case is warranted.

8 Putting the three factors together--a Class II violation, with
9 major damage or potential for harm, and major conduct deviation--a penalty
10 range of \$15,000 to \$12,000 is established, according to the recommended
11 matrix. Thirteen thousand, five hundred dollars (\$13,500) is the mid-point
12 in that range. That amount is the appropriate penalty for this violation.

13 It should be noted that, unlike other environmental statutes, RCRA
14 does not provide that ability to pay is a factor in assessing penalties. As
15 was held previously in In re Wheeling-Pittsburgh Steel Corp., Docket No.
16 RCRA-III-070 (March 20, 1985), such factors as the respondents' income or
17 ability to pay or continue in business should not be a factor in this
18 determination.

19 2. Joint and Several Liability.

20 Upon further research and reflection, complainant has
21 altered its position on full and separate liability for each respondent. In
22 view of the fact that the complaint alleges one violation for the activities
23 conducted at the "C" Street facility, one penalty of \$13,500 should be assessed
24 against the respondents found liable here. This obligation should be a joint
25 and several obligation against all such respondents, as is traditional under
26 common law tort liability.

1 IV. The Rathdrum Site -- X83-04-02-3008

2 Complaint X83-04-02-3008 alleges that George Drexler and his
3 corporations, Terry Drexler, and W.A. (Alan) Pickett operated an HWM Storage
4 and disposal facility for used oil which was mixed with spent solvents. The
5 facility is located near Rathdrum, Idaho, five miles east of the Idaho-
6 Washington border on state highway 53. The facility was eligible for interim
7 status. Violations charged are in three categories -- a.) Disposing of hazardous
8 wastes at the Rathdrum facility without submitting proper Notification or a
9 Part A permit application, b.) submitting a part A permit application for
10 a storage facility without obtaining the owner's signature, and c.) violating
11 several facility standards applicable to HWM facilities eligible for interim
12 status. Penalty amounts for these violations total \$73,500. Each respondent
13 is jointly and severally liable for this penalty amount.

14
15 A. Factual Background at the Site

16 Approximately five miles south of Rathdrum, Idaho, near state
17 highway 53, sits a facility for the storage of used oil and other substances.
18 The facility consists of several above-ground tanks of varying sizes, an
19 underground tank, a loading rack, and three small buildings, one of which contains
20 a shaker screen used for filtering used oil and some small storage tanks.
21 (R27-8, 255-8; Cmplt. Ex. 48, p. 36-7, Cmplt. Ex. 19-Idaho, pp. 7 & 8) Sometime
22 in 1977, Arrcom, Incorporated, and George Drexler purchased the facility from
23 respondent W.A. (Alan) Pickett. (R 257-260) Arrcom used the facility for the
24 storage and disposal of used oil, spent solvents, and other substances prior
25 to treatment of the substances for resale as fuel. (R 257-9; Cmplt. Ex.
26 1,3,8,9,40,& 48-Idaho)

1
2 Arrcom, Inc. sold the Rathdrum facility, including all real and personal
3 property, to respondent Warren Bingham on December 14, 1979. (Cmplt. Ex. 48, p. 33;
4 Cmplt Ex. 49-Idaho) Mr. Bingham leased the property to Arrcom at approximately
5 the same time, for continued use by Arrcom and others as a waste oil and
6 other substances storage and disposal facility. (R 260-262)

7 On May 19, 1980, regulations promulgated under RCRA became effective.
8 They classified certain substances as solid wastes and/or hazardous wastes,
9 subject to regulation under RCRA. Handlers of these substances were required
10 to submit formal Notification and permit applications for facilities which
11 stored, treated, or disposed of these substances by November 19, 1980, as
12 described in part II. C., above. On August 20, 1980, EPA received a Notification
13 of Hazardous Waste activity from Drexler Enterprises, Incorporated (hereinafter
14 Drexler Inc.) regarding the Rathdrum facility. The Notification stated that
15 the facility was owned by George Drexler, and operated by Drexler Inc. Thomas
16 Drexler was listed as the vice-president of the corporation and the facility
17 contact. In that capacity, Thomas Drexler signed the Notification. The
18 document indicated that the Rathdrum facility generated, transported, and/or
19 stored hazardous waste in the form of petroleum sludge. (Cmplt. Ex. 1-Idaho)
20 EPA Identification No. IDD00800961 was assigned to the Rathdrum facility.

21 On November 17, 1980, Drexler Inc. submitted a part A application
22 form for the Rathdrum facility. This document stated that Drexler Inc. was
23 the owner and operator of the facility, and bore the signature of W.A. (Alan)
24 Pickett as secretary of Drexler Inc. in the operator and the owner certification
25 section. This time, W.A. (Alan) Pickett was listed as the facility contact.
26 The 1980 part A application stated that the facility stored hazardous waste,
27 in tanks which had a 67,000 gallon capacity. Only ignitable characteristic
28

1 waste was indicated as present at the facility on this submission, and this
2 was described used oil only. Quantities of 1,250,000 gallons of this hazardous
3 waste were estimated to be the annual intake of the Rathdrum facility. The
4 document also stated that the facility began operation on January 1, 1980,
5 thus making the facility eligible for interim status. (Cmplt. Ex. 3-Idaho,
6 original)

7 On February 3, 1981, Linda Dawson, EPA employee in charge of the
8 permitting if this facility, received a letter from George Drexler, asking
9 that interim status be granted for the facility. George Drexler was named as
10 the person in charge at the facility, and the letter stated that only waste
11 oil was stored at the facility. The letter also stated that "all substantive
12 environmental standards" were being followed at the facility. (Cmplt. Ex.
13 4-Idaho)

14 On August 13, 1981, EPA notified George Drexler that the Rathdrum
15 facility had qualified for interim status. However, the recognition letter
16 made clear that the status was acknowledged only for the storage of ignitable
17 characteristic waste in the form of used oil. The letter specifically informed
18 Arrcom/Drexler Inc./George Drexler that other hazardous wastes, such as spent
19 solvents, could not be handled at the facility until a revised part A permit
20 application was filed, listing any additional wastes. The letter also specifically
21 informed the respondents that the facility was subject to operating standards
22 set forth in 40 CFR Part 265. Interim status for the disposal of any hazardous
23 substance, listed or characteristic, was never recognized by EPA in this or
24 any other letter. (Cmplt. Ex. 7-Idaho)

25 Meanwhile, the Rathdrum facility was accepting hazardous wastes
26 other than ignitable waste oil for storage and disposal at the plant. (Cmplt.
27

1 Ex. 40 & 48-Idaho) These manifests document the purchase and transfer of
2 various spent solvents and characteristic waste from United Paint Manufacturing,
3 Inc. of Greenacres, Washington to the Rathdrum facility. These transfers
4 took place on a regular basis from at least November 19, 1980 to December 3,
5 1981, shortly before the facility ceased active operation. Thomas Drexler
6 signed for these hazardous wastes, indicating that he was vice-president or
7 plant manager on these documents. "Disposal dates" are also indicated on the
8 manifests. In addition, EPA received reports that other solvents specifically
9 contained in the F001-F005 listings for \$265.31 were received at the plant.
10 (Cmplt. Ex. 7-Idaho)

11 Eventually, after Ms. Dawson's prompting and inquiries, on December
12 3, 1981, W.A. (Alan) Pickett admitted that the Rathdrum facility was accepting
13 spent solvents and mixing these solvents with waste oil at the Rathdrum facility.
14 (Cmplt. Ex. 8-Idaho) On the same day, George Drexler acknowledged this
15 problem, and agreed to resubmit a part A application from for the facility. (Cmplt.
16 Ex. 9-Idaho) The original part A application form was returned to Arrcom by EPA
17 on December 4, 1981, with instructions to include all hazardous wastes handled
18 and the facility. (Cmplt Ex. 10-Idaho)

19 The Rathdrum part A application was returned on January 6, 1982.
20 This time, Arrcom, Inc. was named as the operator. Ownership information was
21 not changed. The document stated that listed wastes in the form of spent
22 solvents, Hazardous Waste Nos. F003 and F005, 40 CFR § 265.31, were stored at
23 the facility, in annual quantities of 25,000 gallons. [Cmplt. Ex. 9-Idaho
24 (similar to Cmplt. Ex. 3-Idaho but marked "revised" on the bottom of p.1)]
25 This application was returned to Arrcom for incompleteness. By letter dated
26 February 9, 1982, EPA informed Arrcom/Drexler Inc. that it had to submit a
27

1 D. Proposed Findings of Fact Re Penalties.

2 1. Respondents Richard Cragle and Ronald Inman are
3 individuals who own property, consisting of a shed, an overhead loading rack,
4 and three underground storage tanks, located at 1930 "C" Street, in Tacoma,
5 Washington.

6 2. Respondent Arrcom, Inc. is a corporation which did
7 business in the State of Washington. Respondent Drexler Enterprises, Inc. is
8 a corporation which did business in the State of Washington. The president
9 and major stockholder of each corporation was respondent George W. Drexler.

10 3. Respondent Terry Drexler, Incorporated is a corporation
11 which did business in the State of Washington. The corporation did business
12 under the names of Golden Penn Oil Company and Western Pacific Vacuum Service.
13 The president of this corporation and these organizations was Terry Drexler.

14 4. On August 1, 1981, respondents Cragle and Inman
15 leased the property at 1930 "C" Street to Empire Refining Co., a corporation
16 controlled by respondent George Drexler. Cragle and Inman are residents of
17 Tacoma, Washington, and are lessors of other commercial property in the Tacoma
18 area. They personally and directly received rental payments from the operator
19 respondents.

20 5. Arrcom, Inc. and Drexler Enterprises, Inc., and
21 George W. Drexler operated a business at 1930 "C" Street, beginning on August
22 1, 1981. The business included the management of used oil and spent solvents,
23 by storage of these materials. Spent solvents are materials listed
24 as hazardous wastes by the Environmental Protection Agency (EPA)
25 under Section 3001 of the Act, 42 U.S.C. §6921, and found at 40 CFR § 261.31.
26 A mixture of used oil and listed spent solvents is a hazardous waste, pursuant
27 to 40 CFR §261.3(a)(iv).
28

1 6. Arrcom, Inc. submitted to EPA a Notification of
2 Hazardous Waste Activity and a Part A Permit Application for this business.
3 Respondent's Part A application indicated the business stored listed hazardous
4 wastes, EPA Hazardous Waste No. F003 and F005, in significant quantities.
5 The submissions listed George W. Drexler as the contact person at the facility.
6 George Drexler controlled the operation of the business at 1930 "C" Street.

7 7. EPA rejected the Part A application as incomplete.
8 EPA set two deadlines for resubmission of the application, or submission of a
9 closure plan for the facility. No one resubmitted the Part A application or
10 closure plan for the facility.

11 8. Some time in early 1982, respondents Terry Drexler
12 and Terry Drexler, Inc. subleased the 1930 "C" Street property from Arrcom,
13 Inc. and continued operation of a storage business on the premises.

14 9. On June 9, 1982, a sample of used oil stored in one
15 of the tanks at 1930 "C" Street was taken by EPA agent William Abercrombie.
16 Analysis of that oil revealed the presence of several listed hazardous wastes,
17 including the presence of toluene at 1700 ppm (Haz. Waste No. F003, 40 CFR
18 \$261.31), and traces of ethylbenzene (Haz. Waste No. F003, 40 CFR \$261.31) and
19 and methylene chloride (Haz. Waste No. F002, 40 CFR \$261.31), naphthalene at
20 320 ppm (Haz. Waste No. U165, 40 CFR \$261.33), bis (2-ethyl hexyl) phthalate
21 (Haz. Waste No. U028, 40 CFR \$ 262.33) at 3400 ppm, and di-n-octyl phthalate
22 (Haz. Waste No. U107, 40 CFR \$262.33) at 2000 ppm were also found in the oil
23 sample. These are listed hazardous wastes pursuant to 40 CFR §§ 261.31 & .33(f).
24 Thus, the stored oil was a hazardous waste pursuant to 40 CFR \$261.3(a)(iv).

25 10. On July 15, 1982, EPA inspected the facility, and met with
26 George W. Drexler and Terry Drexler, to explain requirements for the storage
27

1 of hazardous wastes.

2 11. On July 28, 1982, William Abercrombie, EPA designated
3 inspector sent a letter to Terry Drexler, informing him that oil stored at
4 the 1930 "C" Street facility would be hazardous waste, if certain listed
5 wastes were present in the oil, and that operation of the facility prior to
6 clearance of regulatory hurdles was not permitted.

7 12. The facility has continued to operate as a storage
8 facility for used oil, which is possibly contaminated with listed hazardous
9 wastes.

10 13. To date, no complete Part A and Part B permit
11 applications have been filed for the facility, nor has any closure plan been
12 submitted or implemented for the facility.

13 E. Proposed Conclusions of Law Re Penalties.

14 1. Respondents Richard Cragle and Ronald Inman are
15 owners of a new hazardous waste management (HWM) facility, a tank storage
16 operation, and as such are subject to the requirements of Section 3005 of the
17 Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery
18 Act of 1976, as amended, 42 U.S.C. §6924 , and 40 CFR §270.10(f) [formerly
19 40 CFR §122.22(b)].

20 2. Respondents George W. Drexler, Arrcom, Inc., Drexler
21 Enterprises, Inc., Terry Drexler, Terry Drexler, Incorporated d/b/a Western
22 Pacific Vacuum Service and Golden Penn Oil Company are or were operators of a
23 new HWM facility, storing hazardous waste containing hazardous wastes listed
24 in 40 CFR §§261.31 and .33 and, as such, are subject to Section 3005 of
25 RCRA, 42 USC §6925, and 40 CFR §270.10(f) [formerly §122.22(b)].

26 3. Between August 1981 and early 1982, respondents Richard Cragle, ..
27

1 Ronald Inman, George Drexler, Arrcom, Incorporated, and Drexler Enterprises,
2 Incorporated owned or operated a new hazardous waste management facility for
3 storage of hazardous waste without a permit, in violation of Section 3005 of
4 RCRA, 42 U.S.C. §6925, and 40 CFR §122.22(f) (1982).

5 4. Between early 1982 and the present, and specifically
6 on June 9, 1982, respondents Richard Cragle, Ronald Inman, Terry Drexler, Terry
7 Drexler, Incorporated, Western Pacific Vacuum Service, and Golden Penn Oil Company
8 owned or operated a new hazardous waste management facility for storage of hazardous
9 waste without a permit, in violation of Section 3005 of RCRA, 42 U.S.C. §6925, and
10 40 CFR §122.22(f) (1982).

11
12 F. Proposed Order Re Penalties.

13 Pursuant to Section 3008 of the Resource Conservation and
14 Recovery Act, 42 U.S.C. §6928, the following ORDER is entered, jointly and
15 severally, against respondents Richard Cragle, Ronald Inman, George Drexler,
16 Terry Drexler, Arrcom, Incorporated, Drexler Enterprises, Incorporated, and Terry
17 Drexler, Incorporated, dba Western Pacific Vacuum Service and Golden Penn Oil Company

18 1. (a) A civil penalty of \$13,500 is assessed against
19 the respondents, jointly and severally;

20 (b) Payment of the full amount of the civil penalty
21 assessed shall be made within 60 days after service of this ORDER upon
22 respondents by forwarding to the Regional Hearing Clerk, EPA Region 10, a
23 cashier's check or certified check payable to the United States of America.

1 complete part A application or a closure plan for the facility by February
2 19, 1982. (Cmplt. Ex. 5-Tacoma) Nothing further was ever received from any
3 of the operators of the facility.

4 Owner Warren Bingham evicted his tenants for non-payment of rent in
5 January of 1982. (R 260-262, 288-89) On July 20, 1982, EPA officials
6 conducted an inspection and sampling effort at the Rathdrum facility. Michael
7 Brown, EPA inspector, was told, and independently determined, that the plant
8 was not in operation at that time, and had essentially been abandoned since
9 the eviction. (Cmplt Ex. 19 & 20- Idaho) Athena Lalikos, EPA inspector, was
10 told by Mr. Bingham that the facility was not operating, and had not been
11 since the departure of Arrcom. (R 142-45) The inspection revealed that prior
12 to abandonment, oil had been spilled throughout the location, and that tanks
13 containing oil were visibly leaking oil onto the ground. (R 144-45, 159-65;
14 Cmplt Ex. 48, pp. 36-39, 41-43; Cmplt Exs. 19, 20, & 21-Idaho) Ms. Lalikos
15 described the area as a "carpet of fluid, of oil", and described the tanks as
16 in bad repair and leaking. (R 144) This oil on the ground was present
17 despite the fact that Arrcom had changed the dirt and gravel at the facility
18 before it began operations there. (R 256) The inspection revealed no evidence
19 of any record keeping of any kind at the facility. No complete or continuous
20 fence surrounded the site. Tanks were in general disrepair. No safety
21 equipment or fire extinguishers or telephones were present at the facility.
22 (Cmplt Exs. 19, 20 & 21-Idaho; Cmplt Ex. 48, pp. 39-43; R 145-146).

23 During the course of the past three years, Michael Brown searched
24 other records belonging to the various respondents. Arrcom/Drexler records
25 held by the Federal Bureau of Investigation were subpoenaed by EPA. After
26 access was given to these records, Mr. Brown searched for applicable records
27

1 records belonging to Atlee Foss, accountant associated with George Drexler
2 and Arrcom. No applicable records were found there. (Omplt. Ex. 48, pp.
3 49-52)

4 Samples were taken by Ms. Lalikos at the July 20 inspection. Sample
5 225479 (Lab No. 29000) was an oil contaminated soil sample, taken near one of
6 the finished oil storage tanks at the south end of the site. Analysis of
7 that sample revealed the presence of methylene chloride, a listed waste under
8 Haz. Waste No. F002, and trace amounts of other listed hazardous wastes.
9 Sample No. 225480 (Lab No. 29001) was an oil contaminated soil sample taken
10 near a building in the middle of the site where the shaker screen utilized by
11 Arrcom was housed. Analysis of that sample revealed significant concentrations
12 of 1,1,1-trichloroethane (Haz. Waste No. F002), ethylbenzene (F003), and
13 methylene chloride (F005), toluene (F005), and trace amounts of other listed
14 hazardous wastes. (Omplt Exs. 21, 22, 23, & 24-Idaho) (All F001-F005 wastes are
15 found at 40 CFR § 261.31).

16 A second, more extensive sampling and analysis effort was conducted
17 on June 6 through June 8, 1983 at the Rathdrum facility, supervised by Carl
18 Kitz, EPA employee. Again, the facility had not been attended to since the
19 eviction, and the materials present were those left by Arrcom/Drexler Inc.
20 Sample 23401 was taken from tank 19, a large storage tank on the north end of
21 the facility used for intitial storing and mixing of used oil and spent
22 solvents. Oil from that tank revealed the presence of ethylbenzene [F003,
23 5000 ug/l or parts per billion (ppb)], toluene (F005, 6200 ug/l or ppb), and
24 xylene (F003, 17,600 ug/l or ppb). Sample 23410 was taken from another
25 finished oil storage tank, tank 10, near the south end of the facility. Oil
26 there contained ethylbenzene (4,400,000 ug/kg or ppb, or 4400 ppm), toluene
27
28

1 (F005, 1,100,000 ug/kg or ppb, or 1100 ppm), tetrachloroethylene
2 (F002, 310,000 ug/kg or ppb, or 310 ppm), and significant amounts of other
3 listed hazardous wastes. Another finished product tank, tank 8, (Lab No.
4 23411) contained oil contaminated with ethylbenzene (F003, 3,100,000 ug/l or
5 ppb, or 3100 ppm), tetrachloroethylene (F002, 330,000 ug/l or ppb, or 330
6 ppm), toluene (F005, 1,200,000 ug/l, or 1200 ppm), and other hazardous wastes.
7 Tank 11, a tank inside the building which housed the shaker screen (Lab No.
8 23416), was shown to contain ethylbenzene (F003, 1,600,000 ug/kg or ppb, or
9 1600 ppm), tetrachloroethylene (F002, 100,000 ug/kg or ppb, or 100 ppm)
10 toluene (F005, 900,000 ug/kg or ppb, or 900 ppm) and other listed hazardous
11 wastes including significant quantities of xylene (F003). A sample taken
12 from the soil near tank 19, the large storage tank, (Lab No. 23426) showed
13 the presence of ethylbenzene (F003, 20,000,000 ug/kg or ppb, or 20,000 ppm),
14 toluene (F005, 4,100,000 ug/kg or ppb, or 4100 ppm) and xylene (F003, 170,000,
15 000 ug/kg or ppb, or 170,000 ppm). (Cmplt. Exs. 43 & 45-Idaho) In other
16 words, used oil found in the main storage tank, in a tanks next to the filtering
17 processor, and in the finished product tanks showed significant levels
18 of listed hazardous wastes associated with spent solvents. Importantly,
19 these levels rose rather than declined as the oil progressed through Arrcom's
20 production line. Alarmingly, the highest concentrations of listed hazardous
21 wastes were found in the oil which was dumped or spilled on the soil. These
22 sampling efforts confirm the respondents own admissions, and clearly show
23 that the Rathdrum facility was a hazardous waste management storage facility
24 for used oil mixed with significant amounts of listed hazardous wastes. The
25 sampling efforts also show that contaminated oil was dumped and spilled onto
26 the soil at the facility, resulting in disposal of used oil contaminated with
27

1 significant amounts of listed hazardous wastes. The storage facility was
2 operated in a manner such that several substantive regulations for interim
3 status storage facilities were violated. The disposal was conducted without
4 a permit or acknowledged interim status. The result of this careless and
5 illegal operation was a threat to the public health and environment which
6 resulted in an emergency removal action under Superfund (R 38), and which
7 still remains as a unclosed HWM storage and disposal facility existing over a
8 sole source aquifer.

9
10 B. Respondents Collectively Violated the Permitting and Operation Standards
11 Applicable to an Interim Status Facility.

12 As the discussion above demonstrates, the Rathdrum facility's
13 troubled history is marred by irregularities. The part A permit application
14 was submitted not once, but twice with an improper signature and certification
15 for the owner. The facility operated as a disposal facility without ever
16 having applied for or been recognized as a disposal facility. The facility
17 did operate as a storage facility with interim status, but operated in complete
18 disregard of the substantive standards regarding interim status facilities.
19 The operators of this facility, jointly and severally, are liable for civil
20 penalties for these improper and illegal activities, in the amount of \$73,500.

21
22 1. Presence of hazardous waste at the facility.

23 Hazardous waste is defined as a solid waste mixed with a hazardous
24 waste, as hazardous wastes are defined and listed in 40 CFR Part 261. The
25 mixing may be done by the original generator or the storer/disposer, but it
26 is a hazardous waste from the time the original mixture occurs until delisted
27

1 or destroyed. The admissions of the respondents, both on forms submitted to
2 EPA and in conversations with EPA personnel, and the 1982 and 1983 sampling
3 efforts show that used oil mixed with significant amounts of listed hazardous
4 wastes associated with spent solvents was stored and disposed at the Rathdrum
5 facility.

6
7 2. The Reuse/Recovery Exception.

8 As explained in part III. B. 4, above facilities which store hazardous
9 wastes of the type found here are not totally excluded from regulation, even
10 if the operation involves the reuse or recovery of the wastes, and must meet
11 the permitting and substantive standards alleged to be violated here. 40 CFR
12 § 261.6(b). Additionally, disposal of any hazardous waste is not effected by
13 the reuse/recover exception, and facilities at which such activities occur
14 must submit appropriate application forms. The reuse/recovery exception is not
15 a bar to the allegations in this complaint.

16
17 3. George Drexler, W.A. (Alan) Pickett, and Thomas Drexler are Individually
18 Liable as Operators of the Facility.

19 For reasons explained in part III. B. 1, above, it is permissible to impos
20 individual liability for the violations charged, despite the presence of a
21 corporate entity, if it can be shown that individuals are operators or owners
22 actively involved in the operation of the facility. The three individually
23 named respondents were operators of the Rathdrum facility. George Drexler
24 was president and sole stockholder (with his wife) of Arrcom, Inc. and Drexler
25 Inc. He personally appealed for the interim status recognition given the
26 Rathdrum plant, and stated that he was in charge of the operation. He assured
27 EPA officials that the facility was operating in compliance with all standards.

1 He apparently handled all financing for the facility, both in the original
2 purchase and the subsequent resale and lease. He testified that he directed
3 the repair of the facility when it first started operation, directed that
4 clean dirt and gravel be brought in to the Rathdrum plant, and directed the
5 instalation of cement berms around some of the tanks. George Drexler assured
6 the court that all records appropriated for the facility were kept. (R 280-295)
7 In view of all this, respondent George Drexler was an operator of the Rathdrum
8 facility. His testimony to the contrary is inherently untrustworthy and self-
9 serving, and should not alter this finding.

10 W.A. (Alan) Pickett did not bother to respond to court inquiries or
11 appear at the hearing. He was a former owner of the facility who retained
12 some financial interest in the facility. (R 259-60, 268) He was in charge
13 of record keeping and permitting for the facility (R 269), and supervised the
14 inflow of product to the facility (R 267-69). He described himself as hazardous
15 waste manager and facility contact. (Omplt. Exs. 3 & 9-Idaho) He repeatedly
16 communicated with EPA officials concerning permitting and substantive
17 requirements for the facility. He was acting secretary for Arrcom and Drexler
18 Inc. and was given authority by George Drexler to ensure the proper operation
19 of the Rathdrum facilities. (R 268) He was an operator of the facility,
20 fully responsible for the consequences of the illegal operation of the Rathdrum
21 facility.

22 Thomas Drexler was the plant manager. He signed his name to
23 manifests for hazardous wastes received at the plant, as "plant manager" and
24 as "vice president". He was the vice president of Drexler Inc. He listed
25 himself as facility contact for Rathdrum on the Notification of Hazardous
26 Waste Activity form submitted to EPA. Warren Bingham, the facility owner,
27
28

1 told Michael Brown that he understood Thomas Drexler was "in charge" at the
2 Rathdrum facility (Omplt. Ex. 48, p. 34). He was an operator of the facility.

3 All three of these persons were in a position to influence and
4 control the operation of the Rathdrum facility. They were each responsible
5 for the overall operation of the facility. They should now be held responsible
6 for the violations charged here, as operators of the Rathdrum facility.

7
8 5. The Plea Bargain Does Not Effect Liability

9 For reasons stated in part III B. 5., above, the agreement between
10 the United States Attorney for the western district of Washington and respondent
11 George Drexler has no effect on this proceeding.

12
13 C. The Proposed Penalty is Appropriate

14
15 1. Statutory and Policy Considerations

16 All penalties proposed in this action are set forth in Complainant's
17 Exhibit 42-Idaho, and were originally formulated pursuant to EPA's 1980 draft
18 RCRA penalty policy (Attachment 4). Classes of violations were assigned
19 pursuant to the classification system found in the policy. Disposal of
20 hazardous waste without a permit or interim status, and the improper security
21 charge are classified as class I violations pursuant to this policy. Other
22 substantive violations are listed as Class II violations in the policy document.

23 On July 7, 1981, the penalty policy was modified, in a guidance
24 memorandum titled "Guidance on Developing Compliance Orders Under Section
25 3008 of the Resource Conservation and Recovery Act" from Douglas MacMillan,
26 director of the Office of Waste Programs Enforcement, dated July 7, 1981.
27 (Attachment 5) This memorandum reclassified violations of RCRA. Violations
28

1 of interim status regulations were reclassified as class III violations.
2 Accordingly, all regulation violations in this action, except the security
3 requirement violation, were re-computed as class III violations.
4

5 The guidance document reserves Class I violations for those violations,
6 either of the statute or of the regulations, which "pose direct and immediate
7 harm or threats of harm to public health or environment." Disposing of
8 dangerous hazardous wastes on the ground, above a sole source aquifer, was
9 considered such a threat. (Omplt. Ex. 48, p. 55) Failure to maintain security
10 was considered such a threat because of the generally bad condition of the
11 tanks and soil on the site, the nature of the hazardous wastes, and the ease
12 of access to the site. (Id., p. 56) Based upon the foregoing, the Class
13 categorizations by complainant should be upheld.

14 Six violations were classified as major, in the potential damage
15 category (intrinsic nature of the hazardous wastes and the likelihood for
16 exposure). They are: 1.) the disposal without a permit charge (Section 3005
17 of the Act), 2.) the adequate security violation (§ 265.14), 3.) the operation
18 of a facility so that unplanned releases would not occur (the tank leakings),
19 (§ 265.31), 4.) the absence of safety equipment (§ 265.32), 5.) the absence
20 of a waste analysis plan (§ 265.32), and 6.) the absence of an inspection
21 schedule (§ 265.15(b)). Because of the inherent danger of spent solvents and
22 their constituents such as xylene, ethylbenzene, and toluene (see previous
23 discussion) and the relation of the violations to the potential and actuality
24 of exposure of these chemicals to the environment and persons, these determinations
25 should be upheld.

26 Four violations were classified as moderate in the potential for
27 damage category. They are: 1.) absence of a contingency plan (§ 265.51(a)),
28

1 2.) absence of manifest records (§ 265.71), 3.) absence of an operating record
2 (265.73), and 4.) absence of a closure plan (§ 265 subpart G). Because these
3 violations directly involved the same extremely dangerous hazardous wastes, but
4 did not involve a likelihood of exposure, this moderate determination should be
5 upheld.

6 Two violations were classified as minor, in the potential for damage
7 category. The are: 1.) absence of personnel training records of schedules
8 (§ 265.16), and 2.) failure to make contingency plans (§ 265.37). The
9 potential for damage was not considered to be as dramatic for these violations,
10 and these determinations should be upheld.

11 The conduct category was rated as major for all alleged violations.
12 This was based upon George Drexler's explicit assurance that regulations were
13 being followed at the facility, prior to issuance of interim status recognition
14 by EPA, the failure of the operators to inform EPA of the use of spent solvents
15 at the facility until explicitly confronted with the accusation by EPA
16 officials, and the failure of the respondents to meet several deadlines for
17 the resubmittal of application forms or a closure plan. (Cmplt. Ex. 48, p. 54)
18 These determinations should be upheld.

19 Based upon these classifications, appropriate matrixes were assigned
20 to the violations to compute penalty amounts. The mid-range for each matrix
21 cell was chosen for each violation. The total penalty assessed was \$73,350.
22 This total assessment is appropriate, and should be upheld by this court.
23 As explained in part III C. 2, above, this penalty amount should be assessed
24 jointly and severally against the operator respondents.

25
26 D. Proposed Findings of Fact Re Penalties.

27 1. A facility consisting of several storage tanks, oil reprocessing
28

1
2 equipment, and three buildings exists on a site located near Rathdrum, Idaho,
3 five (5) miles east of thwe Washington-Idaho stateline on Idaho state Highway
4 53 (hereinafter "the Rathdrum facility").

5 2. The Rathdrum facility was operated from at least January 1,
6 1980 for the storage and disposal of used oil, spent solvents, and chemical
7 substances such as toluene, ethylbenzene, methylene chloride, 1,1,1-
8 trichloroethane, xylene and tetrachloroethylene.

9 3. The Rathdrum facility was operated by respondents Arrcom,
10 Incorporated, Drexler Enterprises Incorporated, and George W. Drexler,
11 W.A. (Alan) Pickett, and Thomas Drexler, between at least January 1, 1980,
12 and January 1, 1982.

13 4. Respondent Warren Bingham purchased the Rathdrum facility on
14 January 1, 1980, and thereafter owned and possessed the facility, and
15 thereafter leased the facility to respondent Arrcom, Inc. Arrcom, Inc. (and others)
16 operated the facility under this lease from on or around January 1, 1980 to
17 January 1, 1982. Thereafter, the facility ceased active operation and was
18 owned and controlled exclusively by respondent Warren Bingham.

19 5. A Part A permit application for interim status as a hazardous
20 waste storage facility was submitted for the Rathdrum facility on November
21 19, 1980, and this application listed the owner of the Rathdrum facility as
22 Drexler Enterprises, Inc., when the true owner was respondent Warren Bingham.

23 6. The part A application listed only ignitable characteristic
24 waste in the form of used oil as the hazardous waste stored at the facility.
25 No listed hazardous wastes were claimed on the part A application.

26 7. Interim status for the storage of hazardous wastes with ignitable.
27 characteristics, in the form of used oil, was recognized by the EPA on August 11,
28

1 1981. No interim status was recognized for the storage of any other hazardous
2 wastes, including any listed hazardous wastes, or for the disposal of any
3 hazardous waste.

4 8. During the operation of the Rathdrum facility, used oil with
5 ignitable characteristics, and other substances such as toluene, ethylbenzene,
6 methylene chloride, 1,1,1-trichloroethane, xylene and tetrachloroethylene
7 were released into the environment at the facility through the dumping and/or
8 spilling of significant quantities used oil and spent solvents onto the
9 ground at the facility, constituting disposal of these hazardous wastes.

10 9. During the operation of the Rathdrum facility, inadequate
11 security to prevent the unknowing entry of persons or livestock was placed
12 around the facility.

13 10. During the operation of the Rathdrum facility, no efforts were
14 made to minimize the possibility of any release of hazardous wastes.

15 11. During the operation of the Rathdrum facility, no external
16 communication device capable of summoning emergency assistance or other safety
17 devices such as fire extinguishers was kept at the facility.

18 12. During the operation of the Rathdrum facility, no written
19 waste analysis plan was developed or utilized at the facility.

20 13. During the operation of the Rathdrum facility, no written
21 inspection schedule for equipment and storage units, or hazardous waste was
22 developed or maintained at the facility.

23 14. During the operation of the Rathdrum facility, no attempts to
24 make contingency arrangements with local authorities were made.

25 15. During the operation of the Rathdrum facility, no manifest
26 records or operating records were maintained at the facility.

1
2 16. During the operation of the Rathdrum facility or thereafter,
3 no closure plan was developed or submitted for the facility.

4 17. On or about January 3, 1982, respondent operators were evicted
5 from the Rathdrum facility by respondent owner Warren Bingham. The facility was
6 not actively operated by Warren Bingham, and was allowed to remain in the
7 same condition as when respondent operators were evicted from the facility.

8 18. On January 6, 1982, a resubmitted part A permit application
9 was received for the facility by respondent Arrcom, Inc./ Drexler Enterprises,
10 Inc. The application listed spent solvents, EPA Hazardous Nos. F003 and F005
11 (§ 265.32), as additional hazardous wastes stored at the facility. Respondent
12 Drexler Enterprises, Inc. was again listed as the facility's owner. This
13 application was returned to operator respondents as incomplete. At no time
14 was interim status for the disposal any hazardous waste recognized by EPA.

15 19. After January 3, 1982, no closure plan was submitted for the
16 facility, nor was the facility operated pursuant to applicable RCRA regulations.

17 20. On June 20, 1982, EPA inspectors found used oil mixed with
18 significant quantities of spent solvents, listed hazardous wastes under 40
19 CFR § 265.31, stored at the Rathdrum facility, and significant quantities of
20 used oil mixed with significant quantities of spent solvents, listed hazardous
21 wastes under 40 CFR § 265.31, on the ground at the facility. These findings
22 were confirmed by a subsequent sampling effort conducted by EPA on June 6-8, 1983.

23 21. To date, the Rathdrum facility has not been closed pursuant to
24 the closure requirements found at 40 CFR § 265 subpart G.

25 E. Proposed Conclusions of Law Re Penalties.
26

27 1. From at least January 1, 1980 to the present, the Rathdrum
28

1 facility was and is an existing hazardous waste management facility for the
2 storage and disposal of hazardous waste, pursuant to 40 CFR § 260.10. The
3 facility was operated by George Drexler, Thomas Drexler, and W.A.(Alan) Pickett
4 and Arrcom, Inc and Drexler Enterprises, Inc. between at least January 1,
5 1980 and on or about January 1, 1982. The facility was and is owned by Warren
6 Bingham.

7 2. The part A permit applications submitted for the Rathdrum
8 facility to EPA were submitted without a proper signatory for the owner, in
9 violation of 40 CFR § 270.10(b), formerly 40 CFR § 122.4(b).

10 3. The Rathdrum facility was used for the disposal of hazardous
11 wastes without a valid permit or interim status between at least January 1,
12 1980 and on or about January 3, 1982, in violation of 40 CFR § 270.1(b) and
13 section 3005 of RCRA, 42 U.S.C. § 6925.

14 4. Inadequate efforts were made at the Rathdrum facility to minimize
15 the possibility of unauthorized entry during the operation of the facility,
16 in violation of 40 CFR § 265.14.

17 5. Inadequate efforts to minimize the possibility of any release
18 of hazardous waste at the facility were made at the Rathdrum facility during
19 the operation of the facility, in violation of 40 CFR § 265.31.

20 6. No external communication device capable of summoning emergency
21 assistance or other safety devices was provided at the Rathdrum facility, in
22 violation of 40 CFR § 265.32.

23 7. No written waste analysis plan was developed or utilized at the
24 Rathdrum facility or elsewhere, in violation of 40 CFR. § 265.13(b).

25 8. No written inspection schedule was maintained at the Rathdrum
26 facility or elsewhere, in violation of 40 CFR § 265.15(b).

1
2 9. No written schedule or records of training were developed or
3 maintained at or for the Rathdrum facility or elsewhere, in violation of 40
4 CFR § 265.16.

5 10. No attempts were made to make emergency contingency arrangements
6 with local authorities near the Rathdrum facility, in violation of 40 CFR § 265.37.

7 11. No efforts were made to develop a contingency plan for the
8 Rathdrum facility, in violation of 40 CFR § 256.51(a).

9 12. No manifest records were retained or kept at the Rathdrum
10 facility, in violation of 40 CFR § 265.71.

11 13. No operating records were maintained or kept at the Rathdrum
12 facility, in violation of 40 CFR § 265.73.

13 14. No closure plan for the Rathdrum facility was developed,
14 submitted or kept at the Rathdrum facility, in violation of 40 CFR § 265.112.

15 F. Proposed Order Re Penalties.
16

17 Pursuant to Section 3008 of the Resource Conservation and Recovery
18 Act, 42 U.S.C. § 6928, the following ORDER is entered against respondents
19 Arrcom, Incorporated, Drexler Enterprises, Incorporated, George W. Drexler,
20 Thomas Drexler, and W.A.(Alan) Pickett:

21 1.(a) A civil penalty of \$73,500 is assessed against the respondents,
22 jointly and severally;

23 (b) Payment of the full amount of the civil penalty assessed shall be
24 made within 60 days after service of this ORDER upon respondents, by forwarding
25 to the Regional Hearing Clerk, EPA Region 10, a cashier's or certified check
26 payable to the United States of America.
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G. Proposed Findings and Conclusions Re In Personam Compliance Provisions.

1. The Regional Administrator's (RA's) "process" issued to the Respondents in these proceedings consists of two essentially separate, and different, matters, the first of which is a Complaint for Civil Penalties (an "original" proceeding governed by the rules in 40 CFR Part 22), and the second of which is an in personam directive or order to those persons whom the RA determined to be persons who have violated one or more of the "requirements" of Subchapter III of RCRA, which second matter is herein referred to as a "compliance order"

2. RCRA §§ 3008(b), 3008(h), and 9006(b) are all anomalously structured (largely for historical reasons involving legislative oversight in the 1980 and 1984 amendments) to the extent that they require a civil penalty complaint and a compliance order to be issued as parts of the same document. Despite that peculiarity, the statute does not purport to change the inherent legal character of either of those measures. The "complaint" aspects remain process asserting a claim for relief by way of penalties which is originally adjudicated by an ALJ after the reception and evaluation of evidence pursuant to 5 U.S.C. §§ 554 and 556, by means of entering an initial decision, i.e. an adjudicative order. That "final" agency order on the complaint aspect "grants relief" to EPA and "merges" the previously unadjudicated claims for penalties into the order, and thereafter EPA has a claim only "on the order" itself. 40 CFR Part 22 governs all hearing measures on the complaint aspects of these proceedings.

3. The case is quite the contrary as to the in personam directives or "compliance order" aspects of the process issued by the RA. The "compliance

1 order" or in personam aspects of these proceedings are not original proceedings
2 before an administrative law judge ("ALJ") but instead are only "review"
3 proceedings conducted by an ALJ of a regulatory executive enforcement
4 measure previously taken by an RA acting as the executive arm of EPA, and
5 40 CFR Part 22 does not directly control or address the disposition of the
6 compliance order aspects of these proceedings.

7 4. The in personam directives which RAs are authorized to issued
8 (pursuant to Delegation Manual section 8-9-A) are "executive commands" and
9 regulatory measures. The do not constitute "relief" to EPA or "redress"
10 for some antecedent claim EPA had. That principle was made abundantly
11 clear under the Clean Water Act in U.S. v Detrex Chemical Industries, Inc.,
12 393 F.Supp. 735 (N.D.Ohio 1975) and subsequent cases which demonstrate that
13 an EPA compliance order does not merge any preexisting claim into it, and
14 does not operate as "relief" to EPA. Such orders are merely regulatory
15 measures designed to coerce compliance. They are executive commands and do
16 not constitute adjudicative activity by EPA. Their issuance results from
17 executive, not judicial, action by EPA. An RA may vacate, modify, and
18 supersede a compliance order issued by him whereas if an ALJ "issued" a
19 compliance order, then the RA could not affect the compliance order terms
20 except in further proceedings before the ALJ.

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22 5. Based upon this analysis of RCRA "compliance orders", it would be
23 absurd (and unlawful) for an ALJ to receive some sort of evidence and then
24 decide as an original matter whether to issue a compliance order; if so, to
25 whom; and if so, containing what terms. The statute does not envisage an
26 RA applying to an ALJ to issue a compliance order as a matter of "relief"
27 as would a Plaintiff apply to a court for an injunction. The compliance

order, instead of being "relief" or "redress" is only a regulatory executive command which may be reviewed adjudicatively for validity or invalidity. That is the proper task of the ALJ in these proceedings and in that respect the ALJ's adjudicative role is much the same as that performed by a court reviewing an EPA compliance order, for example, in a civil action brought by EPA either for civil penalties for the order's violation, or for the specific enforcement of the compliance order. Admittedly, 5 U.S.C. § 706 by its own terms applies to "courts" and does not apply to such review by an ALJ. But the principles set forth in 5 U.S.C. § 706(2)(A) and (B) and (C) and (D) do, nevertheless, determine the validity or invalidity of the in personam decretal provisions of the RA's compliance order and may be used by an ALJ to determine those issues in proceedings such as the instant case.

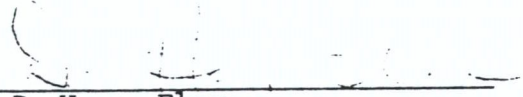
6. Accordingly, consistent with the findings of fact determined in the penalty aspects of these proceedings, it does not appear (and the Respondents in review proceedings are the "proponents" of an order modifying or vacating the in personam decretal provisions of the RA's compliance order, and have, therefore, the burden of proof on all issues relating thereto) that the order was issued other than in accordance with law, and the evidence does not disclose that the RA's issuance of the order was arbitrary or capricious action, or action contrary to any right of Respondents, or was in excess of statutory authority or jurisdiction of the agency. Furthermore, the decretal provisions of the RA's compliance orders (namely, [A] paragraphs 1 and 2 on pages 3 and 4 of the Order dated May 10, 1983 in cause # X-83-04-01-3008; and [B] paragraphs 1 through 8.(f) on pages 6 through 9 of the Order dated April 27, 1983) do not appear to be an abuse

1 of the RA's discretion, and are, consequently, adjudged and declared to be
2 valid and effective henceforth with the following exceptions: (a) The
3 phrase, "on receipt of this Order" in the cited decretal provisions
4 must necessarily be construed (because of these review proceedings) to mean
5 "on receipt of a final order of EPA."

6 (b) The Respondent Bingham, while here declared to be jointly and
7 severally liable with the remaining Respondents to EPA in cause # X-83-04-02-3008,
8 because he settled his liability separately with EPA, is hereby also declared,
9 pursuant to 5 U.S.C. § 554(e), to have his total liability to EPA limited
10 to that provided in the separate agreed order entered herein signed on his
11 behalf and signed by EPA.

12 7. Admittedly, some prior ALJ decisions in RCRA penalty proceedings,
13 for example In re Ashland Oil, Inc., #9-83-RCRA-10 & 40, and In re L.H.,
14 Inc. and C & D Oil Company, #V-W-83-010, do not observe the distinctions
15 made hereinabove and may appear as though the ALJ in those cases was actually
16 issuing as part of his adjudication an in per- sonam order as relief granted
17 to EPA. They need not be necessarily so construed. But even if that were
18 the purport of those decisions, they represent no more than the law of the
19 case in those instances because the analysis set forth above is the necessary
20 and inevitable correct legal result.

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22
23 Respectfully submitted this 7 day of July, 1985.

24
25 
26 D. Henry Elsen
27 Assistant Regional Counsel
28 EPA Region 10

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is an employee of the U.S. Environmental Protection Agency, Region 10, and that on the date shown below copies of the foregoing Complainant's Findings of Fact, Conclusions of Law and Supporting Memorandum were mailed by first-class mail, postage prepaid, to the parties listed on the attached Service List (with the exception of Warren Bingham and Stephen Navaretta).

Dated: July 8, 1985

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